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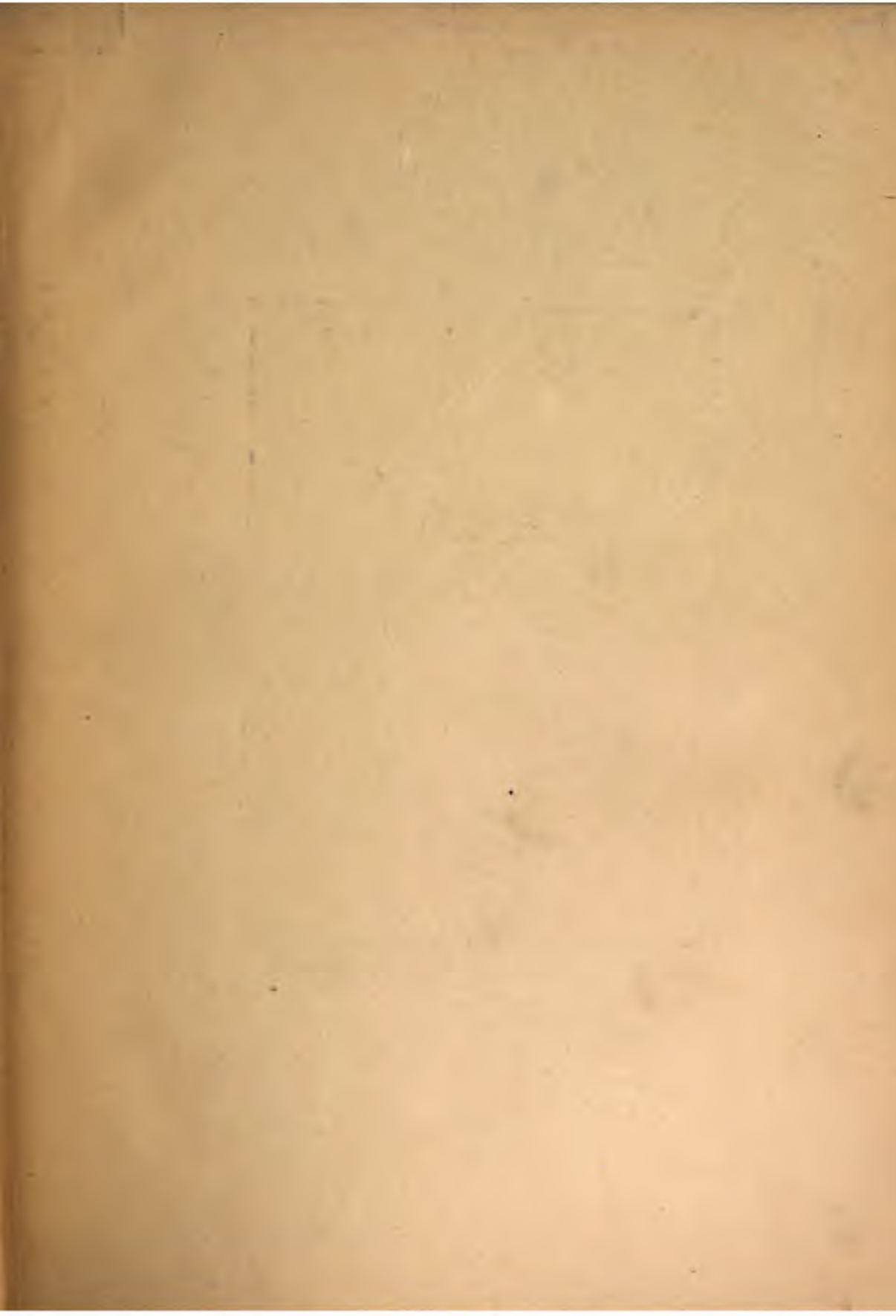
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The Constitutional Review

HENRY CAMPBELL BLACK, Editor

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THE CONSTITUTIONAL REVIEW

- HENRY CAMPBELL BLACK, *Editor*

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By THE NATIONAL ASSOCIATION FOR CONSTITUTIONAL GOVERNMENT

The National Association for Constitutional Government was formed for the purpose of preserving the representative institutions established by the founders of the Republic and of maintaining the guarantees embodied in the Constitution of the United States. The specific objects of the Association are:

1. To oppose the tendency towards class legislation, the unnecessary extension of public functions, the costly and dangerous multiplication of public offices, the exploitation of private wealth by political agencies, and its distribution for class or sectional advantage.

2. To condemn the oppression of business enterprise,—the vitalizing energy without which national prosperity is impossible; the introduction into our legal system of ideas which past experience has tested and repudiated, such as the Initiative, the Compulsory Referendum, and the Recall, in place of the constitutional system; the frequent and radical alteration of the fundamental law, especially by mere majorities; and schemes of governmental change in general subversive of our republican form of political organization.

3. To assist in the dissemination of knowledge regarding theories of government and their practical effects; in extending a comprehension of the distinctive principles upon which our political institutions are founded; and in creating a higher type of American patriotism through loyalty to those principles.

4. To study the defects in the administration of law and the means by which social justice and efficiency may be more promptly and certainly realized in harmony with the distinctive principles upon which our government is based.

5. To preserve the integrity and authority of our courts; respect for and obedience to the law, as the only security for life, liberty, and property; and above all, the permanence of the principle that this Republic is "a government of laws and not of men."

Representative Government

*By David Jayne Hill*¹

Wherever in the world absolute government, in the form of despotism, has been abolished, it has been through the influence of representative government in some form, good or bad, perfect or imperfect. There is now, at this time, no country in the world which claims to have a constitution, which does not claim to have some kind of representative government. Most of the criticisms that have been passed upon it are based upon its failure to produce the results that were expected of it, but whenever they are examined in detail, in each case, I think it can be found to have failed either, first, because of the absence of some corrective device to give stability to popular representative government, as in the case of France, or in its being treated as a practically inoperative system, a sort of concession to public opinion, as in Germany, or in its being considered as a sort of automatic mechanism which can start itself and stop itself at the right time without much human supervision, as in the United States.

In France, for example, it controls the whole government with such completeness, and so promptly expresses the mobile state of public opinion—and in normal times when the Gallic nature is not under the stress and strain of a great public calamity as at the present time, French sentiment is very mobile—that a few votes in the Senate and Chamber of Deputies may completely change the whole government several

times in the same month. The President being practically without power and the ministry depending upon the support of the Assembly, there is repeatedly, for short periods, no government at all in France, and were it not for the tenacity of routine traditions in the administrative offices and the sound practical judgment of the French judges, the Republic, which, properly speaking, has no constitution, but rests upon a few organic laws, would be plunged into the utmost confusion. But it may be said that with all this mobility of feeling in France, which acts so suddenly and destroys the government so quickly, there is in the Gallic mind, a logical quality, a devotion to great ideas represented in the courts of France, that give it a great steadying quality.

In the German Empire, the exactly opposite condition prevails. There every good and perfect gift is believed to come down from above. The Reichstag, though elected by universal suffrage and secret ballot, is in effect little more than a debating society, with power to obstruct new legislation, but obliged to submit all its own proposals to the Bundesrath, a non-elective body representing the sovereigns, before it can act upon them. This is just what Bismarck, who hated parliamentary government, intended it to be.

Now, in the Netherlands, that wonderful little monarchy, with various strictly republican traditions, the peo-

¹From an address delivered before the Lawyers' Club of New York, January 13, 1917, and here reprinted by permission of the author.

ple freely choose their representatives by practically universal suffrage, but having done so, by a unique and as it seems to me an excellent provision, they are prohibited from influencing their deliberations and decisions. They cannot influence the deliberations of their Parliament in any degree whatever. The members of the two chambers are required by the Constitution "to vote without instructions from or conference with those who elect them," which excludes absolutely the intrusion of special interests of every kind and renders impossible the institution known at Washington as "the lobby," the privileges of which are at present permitted to be enjoyed only by those who are supposed to control a considerable number of votes. In addition, the Dutch legislator is required to take a solemn oath on entering office that he has not received or given, and that he "will not accept directly or indirectly, any gift or present from any person, to do or to refrain from doing anything in this office." The result of this is, first of all, great care in selecting members of the legislative bodies, followed by a high consideration for the welfare of the whole people, free from every form of personal interest in the parliamentary deliberations, and a dignified and statesmanlike conduct of public affairs that would do honor to any nation.

In these countries which I have mentioned, as in most European forms of government, the representative system has appeared sufficient; that is to say, having legislation framed by the chosen representatives of the people, without too much popular interference while

they are conducting their work, although provisions seem desirable for a more permanent central balance in France, and certainly for more popular control in Germany, which changes are desired by the best thought in those countries.

In Switzerland, there is a tradition of direct legislation that has slightly, but not profoundly, modified the representative system. This tradition of direct legislation seems to be somewhat in contradiction with representative government; but in fact, representative legislation, though affected slightly, is not affected profoundly by the direct system. In this Confederation of twenty-two cantons, many of them with a very small population, the most ancient legislative customs are those of the local *Landesgemeinde* or "folk-meet," where, as in a town meeting, the male population was wont to meet, and in the smaller cantons like Apenzell still does meet *en masse* to transact public business, pass local laws, and elect administrative officers for the community. The present government of the Confederation, resting upon the Constitution of 1874, in which many of the ideas were taken from the Constitution of the United States, includes the Federal Assembly, a law-making body, the Federal Council, a directive and executive body of seven members, and a Federal Court, charged with the administration of justice in Federal matters.

In the United States, an impression has been created that the Swiss Confederation is governed in the main by direct action of the people through the initiative and referendum, and that it

is this system that prevails in the government of Switzerland. But this is a great mistake. It is so far from being the case with the referendum in Federal matters that the referendum was not formally introduced into the Constitution until 1874. The great mass of current legislation still originates in and is determined by the Federal Assembly without popular participation. Since the adoption of the Federal referendum, only 31 measures have been referred to the people for approval in 42 years, of which only 12 were adopted, while 19 were rejected. The extent to which the electors have participated in these decisions is interesting to note. From 1881 to 1887, 41 to 46 per cent of the electors took part in making the decisions; in 1891, 69 per cent; in 1896, when the subject was the nationalization of the Swiss railroads, 80 per cent, the largest proportion ever attained. From this it would appear that the decisions could have been made by minorities of the whole number of electors ranging from 21 to 41 per cent. of the voting population.

The Federal initiative is of more recent origin than the Federal referendum. In 1891, the initiative was first applied to the Federal Constitution. Of six amendments that were proposed, five were defeated. The character of these proposals should be most interesting to the American people when they are invited to open the Federal Constitution to amendment by popular initiative. In 1894, it was proposed that the Confederation guarantee adequate work of a suitable nature to every citizen. This brought out 56 per

cent of the vote, but was defeated. Another proposal was for the Confederation to turn over two francs per capita to the cantons out of the Federal customs receipts. This proposal also was rejected, 71 per cent of the electors voting. It is very interesting to consider what would be the fate of similar proposals if made in the United States, and what we would be likely to get in this country if we opened the amendment of the Constitution to popular initiative. On March 6, 1906, the Federal Council present to the Federal Assembly a project for the revision of the Constitution extending popular initiative to Federal legislation, which up to that time had not been authorized.

In estimating the value of these measures of direct government as supplementary to representative government in Switzerland, we must take into account three things: First, that the Swiss Federal Constitution contains no bill of rights, which renders it desirable that the people should have a means of defense against oppressive legislation; second, that, as a Confederation, the cantons have diametrically opposite interests, which they do not desire to see overruled; and third, that the Swiss Constitution provides no veto power, except the referendum, while in the United States we have the presidential veto, which requires a two-thirds vote of both houses of Congress to overcome it.

The initiative has been compared by Swiss constitutional writers to a kind of "safety-valve," which should be resorted to only upon rare occasions of dire necessity, to prevent a popular ex-

plosion. The referendum, however, has a far more important place and function, a much greater utility. It provides a means by which a people whose traditions and local usages, as well as their general equality, incline them to guard very jealously their communal and cantonal privileges, may pass judgment upon the proposals of the central authorities. Where personal and local rights and liberties are from any cause endangered, it is but just to permit such expression, and especially where there are no constitutional guarantees for their protection. For example, at the present moment, in the District of Columbia, Congress is empowered to enforce on the population, who do not elect representatives in Congress, excessive taxes at their will, and sumptuary laws against the will and judgment of the people, who are not without intelligence and not without a consciousness of their liberties. But there is no European nation, certainly not even the small Swiss Confederation, with its 3,500,000 inhabitants, a population little more than half as great as the Greater City of New York, that would, for a moment, place its main reliance upon direct popular legislation, not to speak of a great nation with vast and varied interests, with difficult questions of foreign policy, and widely different local conditions.

Now, when we come home to our own country, we find a situation entirely different from that of any European country. It is and has always been entirely different from the political situation of European nations.

The founders of our government, after 150 years of practically represen-

tative self-government as colonies of Great Britain, and in the full light of the world's thought and experience up to that time, found themselves in a position to establish a government different from any that had ever existed in the world. And this they proceeded to do. They possessed a profound belief in the worth of the human individual and the value of personal liberty, the liberty of every man to cherish his own creed or faith without fear of restraint or intimidation, the liberty of every man to use all his faculties in self-development for the attainment of his end and ideals in life. They intended to create a government where absolutism, either royal or parliamentary, could not enter; and they proposed to establish the new government for the rule of just and equal laws, without distinction of persons, without distinction of classes, without distinction of sections, and for that purpose to base it upon a fundamental law, in which the rights and liberties of the people should be protected against the government itself. They were not opposed to government, but they wanted as little government as possible. They wanted an opportunity for self-development. In other words, they thought there were rights and liberties so sacred to the human person that there should be no power in government to take them away or destroy them.

All the early state constitutions and the Federal Constitution of this country were framed in this spirit and with this intent. They grew out of a long and unique experience of freedom, which they were designed to preserve. They were in no sense imitations; they

were original combinations. We are sometimes told that the American government is only a projection, in a sense an extension, of the British government. It is not so. There were four principles, some of which were taken from the British system, which were combined to form our system.

1. Representative government, a heritage from English liberty, dating perhaps from the Norman Conquest, but which English practice by electoral reforms in later years following American example was greatly to improve.

2. The division of powers; that is, a distribution of public powers established by law in such a manner as to prevent the absolute control of government by any one of its agencies.

3. The guarantee of personal immunities—the rights of free speech; freedom of the press; of peaceable assembly; of petition for redress of grievances; of bearing arms; of security of persons, houses, papers, and effects against unreasonable search; of trial by jury; of not being twice put in jeopardy of life or limb for the same offense; of refusing to bear witness against oneself; of not being deprived of life, liberty, or property without due process of law; and many other guarantees never before secured in any country by fundamental law.

Now these are not borrowed from England. England had no such fundamental law. England had the Great Charter, but the Great Charter permitted any right or liberty to be taken away from the Englishman by the judgment of his peers; but the Constitution of the United States lays it down as a rock-bottom principle that

these liberties and others may not be taken away from the American citizen by the judgment of his peers. They are his. They are his forever, and they cannot be taken away.

4. Judicial protection of the constitutional guarantees—a unique provision never before provided for in any charter of human liberty—by which the government, and even a majority of the people or their representatives, cannot legally render valid the invasion of those immunities by any subsequent act of legislation.

By this combination of guarantees and the provision for their protection, the Constitution of the United States gives to representative government a perfection that it had never before possessed, by placing upon the people's representatives a body of legal restraints that forbid their disregard of these primary rights and liberties, to secure which our independence as a nation was declared, and to maintain which the Constitution was adopted.

It is a fact of the utmost significance that after having been held in reverence for a century and a quarter, and having brought the nation to the position of unity, power, and prosperity it has now attained, the Constitution should have been subjected in recent years to a series of attacks directed against each of the four corner-stones of our government. It is a sad commentary upon the patriotism of the country (so it seems at least to one who lived in other countries, and defended the Constitution in foreign lands, to come home to see violent hands laid upon it) that this attack, often offensive in form, and always crude in substance, should have

been permitted to continue and endure now these dozen years, for purely political motives, and never should have been adequately met and resisted by the union of intelligent citizens.

For representative government, the neologists—who would not know themselves under that name perhaps—would substitute direct government by a majority of the people, by means of the initiative and referendum, and the recall of public officers, particularly judges. For the division of powers, they would substitute the concentration of power in the hands of the executive, in order that through his urgency, through his control of the elective representatives of the people, he may promptly override the judgment of those representatives freshly chosen by the people, and often in disapprobation of the President's course, and without discussion formulate into laws demands pressed home upon him by private or class interests, with the certainty of political consequences in case of really independent action on his part. For the guarantees of personal immunities contained in the Constitution, they would substitute what they call a "gateway amendment," opening the door for the absolute will of a majority of the voters, which would be empowered to change the Constitution at any time, to insert any restrictions upon personal liberty and the rights of great states that have been reserved to them by the Constitution. Finally, they would practically abolish the Supreme Court of the United States, by denying its authority to declare unconstitutional any law, regardless of its conflict with the present constitutional guarantees.

To many minds it is incredible that any of these things should actually happen, but the public generally is not aware of the forces that are quietly working to accomplish these ends. Society after society has passed and published resolutions that any judge who declares any act of any legislative body, or any act of direct legislation where that is possible to be unconstitutional, should be recalled from the bench. It is not possible, within the limits of time at my disposal, to convey a conception of the extent, the violence, and the persistence of these attacks upon all that is characteristic of our fundamental law, or to point out the dangers to our republic if these attacks should ever prove effective and transform our government of laws into a government of men.

But I have no right to speak in generalities. What I am trying to convey is so remote from many minds that it would be necessary to speak very concretely in order to persuade them. I will therefore let the Honorary President of the "National Popular Government League," an extensive organization, embracing, I believe, several hundred thousand supporting members, and claiming to control two million votes, formed to promote the initiative, referendum, and recall and the "gateway amendment," speak for himself. This gentleman, a Senator of the United States, having declared in a meeting of the League recently held in Washington that it is "unparalleled impudence for the Supreme Court of the United States to declare unconstitutional any act of Congress," and being reminded that he might be held in con-

tempt for his remark, is reported to have said: "Let them dare to summon me, and I will start a row that will shake this continent to its very foundations," adding, "do we want Gatling guns sweeping the streets of our cities?" I offer no interpretation of these remarks, and I refrain from comment upon them, further than to say that if this Society is contemplating revolution and foresees a use for Gatling guns, it is more dangerous even than I have supposed it to be.

On January 8th, the same Honorable gentleman introduced into the Senate of the United States a resolution in which it is declared that "the Constitution of the United States gives no authority to any judicial officer to declare unconstitutional an act which has been declared constitutional by a majority of the members of the United States Senate and House of Representatives and by the President of the United States, who, on their several oaths have declared the opinion in the passage of such act that it is constitutional," that is, declared it constitutional by passing it, and he demands that any federal judge who declares any act passed by the Congress of the United States to be unconstitutional, be declared "to be guilty of judicial usurpation," and to have "vacated his office."

The revolutionary character of this resolution, and of the intentions that are behind it, cannot and certainly will not be overlooked by those whose business in life it is to guard the sanctity of the laws. The import of the various assaults upon our fundamental law and the disposition to emasculate or

abandon it is evident to every well-instructed mind. The misfortune is that there is among our fellow citizens, who in the end, knowingly or unwittingly, must decide these issues, so little familiarity with these questions. The subject is almost neglected in our colleges and almost entirely unknown in our schools, and a generation is growing up that does not know the Constitution from an Egyptian obelisk.

It is now about two years since the National Association for Constitutional Government was organized by a small company of jurists and business men, numbering now about five hundred, for the purpose of enlightening the public upon the changes proposed with reference to our fundamental law, and the consequences that would naturally follow and flow from their adoption. This attack upon the judiciary, which the Association has already met and answered in one of its publications, is alone sufficient to justify the existence of the Association, but this is only one of the many revolutionary projects which have to be fully considered. If this Association were not already in existence, it would be imperatively demanded by the emergencies of the hour.

Over the judge's chair in one of the court rooms of Massachusetts hangs the motto: "Here speaketh the conscience of the State, restraining the individual will." It is a time when in this country the conscience of the State should not be silenced. It is not, surely, a propitious time, in the midst of the violence and commotion that now agitate the world,—a violence and a commotion that may, against our will

as a pacific people, draw us suddenly and unexpectedly into the vortex,—to nullify the influence of this nation, or to divide its strength by abolishing our form of government. This is rather a time for fearless and united action to sustain, strengthen, and promote the institutions of justice, and to see that the ermine of the judge be not defiled by

the hands of politicians. If our Constitution requires a change, well and good; let us discuss it calmly and deliberately, and give the specific reasons for it, but let us not abolish the guarantees of our freedom, or drag justice from its seat because it dares to proclaim the law.

Shall We Change Our Form of Government

By N. C. Young

Former Chief Justice of the Supreme Court of North Dakota

"Everything is wrong. Nothing is right. Whatever is, is obsolete. Let all changes which may be proposed be speedily made." These words measurably describe the mood of a large part of the people of this country at this time. It is not fair to say that this attitude springs from a general abandonment of sane purposes and ambitions, for that is not true. It is more just to say that it represents a popular protest against existing evils and an honest ambition for improvement, for better things, for progress. We know that all progress requires change. We know that the old gives way to the new, and because of this ever recurring fact many of us conclude that every change suggested means progress, and promptly approve it without carefully inquiring whether the proposed change will carry us forward or backward.

One of these proposed and imminent changes presents a question for decision to each one of us, which I believe is the most important and serious one that has confronted the people of this country since the establishment of our government. I refer to the present

popular movement to change the framework of our government from a republic—that is, a representative democracy, to a pure democracy; from a government in which the people legislate and rule through representatives chosen by themselves, to a government in which the people in person assume the entire exercise of judgment and the personal burdens and duties of administering the government.

No question of the power of the people is involved in the proper discussions of, or in answering this question. Since the promulgation of the Declaration of Independence the people in this country have been sovereign and supreme. These words of Daniel Webster are as true to-day as when they were uttered in 1848: "He who considers there may be, is, or ever has been since the Declaration of Independence any person who looks to any other source of power in this country than the people so as to give peculiar merit to those who clamor loudest in its assertion, must be out of his mind even more than Don Quixote. His imagination was only perverted; he

saw things not as they were, though what he saw were things. He saw windmills and took them to be giant knights on horseback. This was bad enough, but whoever says, or speaks as if he thought that anybody looks to any other source of political power in this country than the people must have a stronger and wilder imagination, for he sees nothing but the creation of his own fancy. He stares at phantoms. Let all admit what none deny, that the only source of political power in this country is the people. Let us admit that they are sovereign for they are so, that is to say, the aggregate community, the collected will of the people, is sovereign."

The question then is not, have the people the power? The real and only question is, how shall the people exercise their power? Shall we continue to exercise the powers of government through representatives chosen by ourselves under the plan given to us by the founders of this nation, or shall we discard this plan and attempt to personally exercise the judgment, the duties and functions of government ourselves? It is for us to choose. We have the power to abolish our plan of government, to amend it, or to adopt any form of government which we may prefer.

It was the unanimous judgment of the founders of this nation that a pure democracy, that is, a government in which the people exercise the judgment, the duties and the functions of government personally, was not possible or feasible in this country. What they did was to give us a republican form of government, a representative democracy, a government by represen-

tatives chosen by the people for definite terms and with authority and powers restricted by constitutional and legislative restraints, which is the nearest approach to a pure democracy that they deemed consistent with stability and safety. It is now proposed to change this system to a pure democracy, a system which was condemned and rejected by the founders of this nation without dissent and after the most mature deliberation. The leaders in the present crusade do not disguise or deny the fact that it is their purpose to effect this change. Indeed they proclaim that it is their mission to bring or place the government in the hands of "the people," to abolish government by representatives, and to substitute for it the direct personal judgment of the people themselves. It is proposed to accomplish this change by adopting and incorporating into our Constitution and laws what are known as the initiative, referendum and the recall. We all must admit that if the changes embraced in these proposals are approved and adopted by us they will have the effect sought for, that is, the abolition of representative government and the establishment of a pure democracy—a direct government by the people acting in person.

Through the medium of the initiative the people will, without the aid of conference or consultation, and independent of all legislative bodies, acting for themselves as a great but disassociated body, enact such laws as any elector may propose which shall receive the approval of a majority of the electors. Through the referendum the people will, by a majority vote of the

electors, annul such acts as are passed by existing legislative bodies as do not at any time meet the approval of a majority of the electors. As applied to constitutions, the initiative and referendum will make their provisions and guarantees subject at all times to the will of a majority of the electors. Through the recall all public officers will be required in their official acts and at their peril, to reflect the present opinions of a majority of the electors; and judges, in construing constitutions, constitutional guarantees and statutes, or in deciding private controversies, will be required to make their decisions conform to the present opinion of a majority of the electors, all under the peril of being removed by a dissatisfied majority of the electors.

It is very plain that this is a revolution in the plan of government under which we have lived—a peaceable revolution to be sure, but nevertheless a revolution, and it must be judged and approved or disapproved by us as such.

A proposed change in the form of any government, whether it be by force or peaceful means, is always a most serious matter. Experiments in government are dangerous and should be entered upon only for pressing and sufficient reasons, and then only after the most mature reflection. No intelligent people will blindly change the form of their government merely for sake of a change. All citizens who are capable of self-government, who are capable of reflection and intelligent action, will satisfy themselves before making such a revolutionary change as that now proposed, that there is in fact a vital defect in our plan of govern-

ment and that the proposed change will, with reasonable certainty, remedy it. All thoughtful men should and will exact from the sponsors and advocates of this change satisfactory proof of two things: First, that the representative system of government under which we have lived is vitally defective; and second, that the plan of government which they propose—a pure democracy, is better and will remedy it. It is not reasonable to ask us to give up what we have and adopt something new without satisfactory evidence that the change will be an improvement. Upon a matter of such vital concern to each one of us, our good sense, our reason, our experience and affection for our country, and hope for its future progress and safety, demand that we proceed with caution and that we decide this question only upon the most unselfish motives and upon the most complete investigation. No conscientious citizen will attempt to justify the proposed change for personal, selfish, factional or political reasons. The question is above selfish, factional or party interests, for the answer to it affects the stability of the government under which we live, which shelters us, and which we hope will shelter our posterity.

It is not to the point to criticize or condemn the motives of the promoters of this movement. It is sufficient to know that the question is now presented to the people of this country for an answer. It must be answered. And it will be answered either intelligently and upon reflection or under the compelling influence of passion and prejudice. It does not matter as to the mo-

tive with which it is answered; the result of a change will be the same. The serious question is, how shall it be answered? Is the change proposed a step forward or is it a step in the dark, or a step backward? This is a time when we must think for ourselves, for each citizen must answer for himself, and upon the answer depends the future of this country. Surely at this juncture we should heed these words of Lincoln: "If we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence so conclusive, and arguments so clear, that even their great authority fairly considered and weighed cannot stand." Up to the present decade our Constitution with its guarantees of personal liberty and private rights, its checks and balances, its separation and independence of legislative, executive and judicial powers, and the representative plan of government established by it, had our undivided respect and affection as it still has of the lovers of liberty in all other countries of the world. Shall we now say, without reflection, that this plan of government is wrong? Do not the circumstances under which our Constitution was created, do not the high character and purpose of the men who framed it, commend its provisions to our favorable consideration?

Thirty-nine men, the ablest of the colonies, met in Independence Hall in Philadelphia, representing the three millions of people of the colonies, and published to the world the declaration of their independence. It required seven years of war to secure an acknowledgment of their freedom. The

government hastily created by the Articles of Confederation, at most a temporary expedient, inadequate even during the war when it was sustained by the common dangers and ardent patriotism of that period, was totally inadequate when peace returned. The people of the colonies had not surrendered to it sufficient power to enable it to perform the proper functions of government. Because of its weakness it had little respect at home and was an object of derision abroad. The new-born nation was falling to pieces. The liberty so recently won was on the point of being lost by the people of this country for want of a government of sufficient strength to preserve it. It was fortunate for the people of that period, for us, and for the world, that this crisis in our national life came when the men of the Revolution were still in their full vigor and before they had been succeeded by another generation. A call went out to the colonies for a convention of representatives to meet this crisis. Each colony sent its wisest and best. This convention also assembled in Independence Hall from which eleven years before—and they were eventful years—the representatives of the colonies had proclaimed their independence.

History has no record of the organization of a government under circumstances more portentous of success, or of an assemblage of men better qualified, by training, experience and patriotic zeal for the task of organizing a government to preserve human liberty; soldiers of the Revolution, statesmen, schooled in state and national affairs and in the science of government, pa-

triot all of them. Washington, the most efficient champion of human liberty the world has yet produced; Roger Sherman, Robert Morris, James Wilson and Benjamin Franklin—these four signers of the Declaration of Independence—Franklin, a statesman and philosopher, full of years and wisdom, the peer of any age,—Rufus King, Livingston, Dickinson, Rutledge, the Pinckneys, familiar household names; and Madison and Hamilton, masters of the science of government and expounders of the Constitution in the “Federalist,”—translated into a dozen languages, for which “services to the cause of liberty” upon the recommendation of the Committee of Public Instruction they were voted honorary citizenship by the National Assembly of France.

By unanimous vote Washington was made president of the convention. They deliberated from May 25th to September 17th, 1787, when, by unanimous vote, they approved of the Constitution and also Washington’s letter commending it to the people of the colonies for adoption, in which he said that it was “the Constitution which has appeared to us most advisable. * * * In all of our deliberations on the subject we kept steadily in our view that which appears to us as the greatest interest of every true American,—the consolidation of our union, in which is involved our prosperity, felicity, safety, perhaps our national existence. * * * It is liable to as few objections as could reasonably be expected. We hope and believe that it may promote the welfare of that country so dear to us all, and to secure her freedom and

happiness is our most ardent wish.”

The members of the convention knew that all attempts to establish popular governments in the favor of pure democracies had resulted in failure. It was the high ambition and purpose of the members of this convention to avoid the causes of the downfall of other democracies and to frame a plan of government which should be of the people, for the people, and by the people, which would endure. The members of this convention believed that they had solved this problem for themselves and for us through the separation and independence of the executive, legislative and judicial powers and the introduction of the principle of representation instead of direct action of the people. Hamilton voiced their opinion in these words: “It seems to have been reserved to the people of this country, by their conduct and example, to decide the important question whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitution on action and force.” Jay, who was not a member of the convention and therefore could speak freely on the subject, in advocating the adoption of the Constitution, said, in reference to the deliberations of the convention: “This convention, composed of men who possessed the confidence of the people, and many of whom had become highly distinguished for their patriotism, virtue and wisdom in times which tried the minds and hearts of men, undertook the arduous task in the mild season of peace, with minds unoccu-

pied with other subjects. They passed many months in cool, uninterrupted and daily consultation, and finally, without having been awed by power or influenced by any passions except for love of their country, they presented and recommended to the people the plan produced by their joint and very unanimous councils." It was by such men and under such circumstances, that the Constitution was created and adopted. There were no candidates for office in the convention which framed it.

To the critics of that time who pointed ominously to the unbroken failures of popular governments in the form of pure democracies, Hamilton in defending the Constitution, answered: "If it had been found impossible to have devised models of a more perfect structure, then the enlightened friends of liberty would have been obliged to have abandoned that species of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood which were either not known or imperfectly known to the ancients. The distributions of powers into distinct departments, the introduction of legislative balances and checks, the institution of courts, holding their offices during good behavior, the representation of the people in the legislatures, by deputies of their own election,—these are wholly new discoveries, or have made their principal progress toward perfection in modern times. They are the means and power by which the excellencies of representative govern-

ment may be retained, and its imperfections lessened or avoided."

The plan of government thus wrought out was approved by the people of the thirteen colonies after a full discussion of its merits. The distribution of powers into separate and independent departments and the representative principle established by the national Constitution were also made vital principles in the state constitutions adopted by the colonies. During the one hundred twenty-five years since the Federal Constitution was adopted, and at various intervals, commencing with Vermont in 1791, the inhabitants of more than thirty states, widely separated, have framed constitutions upon the same plan and embracing the same principles and have presented themselves for admission and been admitted into the Union. The plan of government given to us by the founders of this nation had their complete and unanimous approval. It was not until the present decade that it was suggested that this plan was wrong or obsolete.

Recently a number of states have become full converts to the present popular movement for a pure democracy—for direct government by the people. The recent action of the people of the State of California in adopting the initiative, referendum and recall in their constitution is not of much aid in determining whether a representative or pure democracy furnishes the best plan of government. At their recent election they decided in favor of the direct plan. Manifestly they did not act with the calm and deliberate purpose and upon the reflection that characterized the framing of the Federal Constitu-

tion, and its subsequent adoption by the several states. The people of that state were deeply and righteously stirred by graft exposures, municipal corruption, dynamite outrages, corporate oppression and corporation interference in public affairs. Compelled and influenced by these imminent grievances, they adopted the direct method of government by the people, as a speedy and effective means of curing their present evils without much if any thought of future danger when the public mind is not aroused.

The deliberate judgment of the people of this country up to the present crusade has been unanimous in condemning the purely democratic form of government. This is also the unanimous verdict of history. It is also the judgment of writers upon the science of government in both modern and ancient times.

Garner, in his late work on Political Science, says: "Democracies are of two kinds, pure or direct, and representative or indirect. A pure democracy is one in which the will of the state is formulated and expressed directly and immediately through the people acting in their primary capacity. A representative democracy is one in which the will of the state is ascertained and expressed through the agency of a small and select number who act as the representatives of the people. A pure democracy is practicable only in small states where the voting population may be assembled for purposes of legislation, and where the collective needs of the people are few and simple. In large and complex societies where the legislative wants of the people are nu-

merous, the very necessities of the situation make government by the whole body of the citizens a physical impossibility. * * * What is in substance a representative democracy is sometimes called a republican or representative government. * * * A pure or direct type exists in too narrow and restricted a form and is too impracticable to merit extended consideration. Sufficient for the needs of the few small communities where it still survives, it is wholly unsuited to the conditions of the complex states of to-day."

Burke, in his "Reflections on the French Revolution," said: "I reprobate no form of government merely upon abstract principles. There may be situations in which the purely democratic form will become necessary; there may be some, (very few and particularly circumstanced), where it would be clearly desirable. This I do not take to be the case of France, or of any other great country. Until now we have seen no example of considerable democracies. The ancients were better acquainted with them. Not being wholly unread in the authors who have seen the most of these constitutions, and who best understood them, I cannot help concurring with their opinion that the absolute democracy, no more than the absolute monarchy, is to be reckoned among the legitimate forms of government. They think it rather the corruption and degeneracy than the sound constitution of a republic. If I recollect rightly, Aristotle observes that a democracy has many striking points of resemblance with a tyranny. Of this I am certain, that in a democracy the majority of citizens is capable of ex-

exercising the most cruel oppression upon the minority whenever strong divisions prevail in that kind of policy, as they often must, and that oppression of the minority will extend to far greater numbers and will be carried on with much greater fury than can almost ever be apprehended from the domination of a single scepter. In such a popular persecution individual sufferers are in a much more deplorable condition than in any other. Under a cruel prince they have the balmy compassion of mankind to assuage the smart of their wounds; they have the plaudits of the people to animate their generous constancy under their sufferings; but those who are subjected to wrongs under multitudes are deprived of all external consolations; they seem deserted by mankind, overpowered by a conspiracy of their own species."

Madison, in expounding the Constitution, in the *Federalist*, said: "A pure democracy can admit of no cure for the mischiefs of factions. A common passion of interest will in almost every case be felt by a majority of the whole. A communication and concert result from the form of government itself, and there is nothing to check the inducement to sacrifice the weaker party or any obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence. Their conditions have ever been found incompatible with personal security or the rights of property, and have in general been short in their lives as they have been violent in their deaths. Theoretical politicians who have patronized this species of government have erroneously supposed that by reducing mankind

to a perfect equality in their political rights they would at the same time be perfectly equalized and assimilated in their possessions and opinions and their passions."

Webster, in his speech on the Rhode Island government, in 1848, said: "The people cannot act daily as the people. They must establish a government and invest it with as much of sovereign power as the case requires. * * * The exercise of legislative power and the other powers of government immediately by the people themselves is impracticable. They must be exercised by representatives of the people, and what distinguishes the American government as much as anything else from any government of ancient or modern times, is the marvelous felicity of the representative system. * * * The power is with the people, but they cannot exercise it in masses or per capita. They can only exercise it by their representatives. * * * It is one of the principles of the American system that the people limit their governments, national and state. It is another principle, equally true and certain and equally important, that the people often limit themselves. They set bounds to their own powers. They have chosen to secure the institutions which they established against the sudden impulse of mere majorities. All our institutions teem with instances of this. It was the great conservative principle in constituting forms of government, that they should secure what they had established against hasty changes by simple majorities. * * * It is one remarkable instance of the enactment and application of that great American principle that the

constitution of government should be cautiously and prudently interfered with and that changes should not ordinarily be begun and carried through by bare majorities. * * * We are not to take the will of the people from public meetings, nor from public assemblies, by which the timid are terrified and the prudent are alarmed, and by which society is disturbed. These are not American modes of securing the will of the people, and never were."

Leckey, in his "Democracy and Liberty," says: "One thing is absolutely essential to its safe working, namely, a written constitution securing property and contracts; placing difficulties in the way of organic change; restricting the power of the majorities, and preventing outbursts of mere temporary discontent and mere casual conditions from overturning the main pillars of the state."

Mill, in his *Essay on Government* says: "In this great discovery of modern times, the system of representation, the solution of all the difficulties, both speculative and practical, will perhaps be found. If it cannot, we seem to be forced upon the extraordinary conclusion that popular government is impossible. * * * The community can act only when assembled, and when assembled it is incapable of acting. The community, however, can choose representatives."

Tucker, in his work on the Constitution says: "Representation is the modern method by which the will of a great multitude may express itself through an elected body of men for deliberation in law making. It is the only practicable way by which a large country can

give expression to its will in deliberate legislation. Give suffrage to the people; let law-making be in the hands of their representatives; and make the representatives responsible at short periods to the popular judgment, and the rights of men will be safe, for they will select only such as will protect their rights and dismiss those who, upon trial, will not. * * * The government of the numerical majority is the mechanism of brute force."

The general judgment of students of the science of government upon our Constitution is summarized in the familiar statement of the great English statesman, Gladstone, when he characterized it as "the most wonderful work ever struck off at a given time by the brain and purpose of man."

Are all these mistaken views? Did the founders of this republic underestimate the capacity of mankind for self-government? Did they err in believing that it was necessary, in order to protect the rights of individuals and minorities to place constitutional restraints upon majorities? Did they err in making the three departments of government and in making them independent of each other? Were these precautions unnecessary to prevent usurpations of power? Has the representative plan of government given to us by the founders of this republic been a failure, that we should now discard it?

Does history record a period in which there has been such political, social and material progress as that since the adoption of our Constitution? Has any nation on earth a similar record for incorruptible executives? Has any ju-

dicial tribunal ever existed of the high rank and efficiency of our Federal Supreme Court? Have not the judges of the inferior federal courts as a body been men of high ability and of irreproachable character? Where just cause for criticism has existed, has it not been the rare exception?

We have had scandals connected with the election of national legislators, but have not these too been exceptions, and do they not serve to emphasize the high character of our national legislative body as a whole? In our hundred and twenty-five years of history has any law ever been put upon the federal statute books as a result of bribery? But shall we expect perfect government from imperfect men? And is it not true that where corruption or bribery has elected a member of our national legislature, it has been caused by the sensual to good conduct and sane judgment, indifference or deliberate neglect of the electorate? In such cases is it not true that it is not the plan of government, but the character of the electorate which is at fault? Is there any legitimate reason for believing that an electorate which through indifference, incompetence or corrupt motives, chooses corrupt legislators will, when acting directly, produce wise and righteous laws?

Before abandoning the representative form of government, shall we not consider what the dissemination of the representative principle established by the founders of this republic has done for the advancement of human liberty throughout the world? Shall we forget that the French Republic had its origin in the plan evolved by the found-

ers of this republic? Shall we forget that our plan of government furnished the plan for the German federation? Shall we forget that the American idea of constitutional checks upon the exercise of governmental power by adoption has placed its limitations upon almost all surviving monarchies of the world? Shall we forget that it removed in form at least all despotic power from the Western Hemisphere, and gave to each country in this western world a constitutional form of government? Do we not know that within the last few years the ancient empire of China has adopted a republican form of government with a constitution largely modeled after the plan framed by our fathers in 1787? Were the founders of this republic mistaken? Have we too been misled? Rather, are we not now being misled? And are we not now about to adopt a plan of government which is foredoomed to failure?

We are now asked to abandon the representative form of government for what is in effect a pure democracy. Is this to go forward or to go backward? If we follow the leaders of this movement, are we not following the blind leaders of the blind? What new assurance of success, if any, do they hold out to us? Has human nature changed? Do we expect it to change? Have men ever been perfect? Will they be perfect under a pure democracy? Is it not true that mankind is and always has been, and so far as we know, always will be, creatures of passion and prejudice, prone to violence and hasty judgment; requiring restraint as an essential to good conduct and sane judgment?

ment? Is not the difference between the savage and the civilized man this: that one acts without restraint and the other acts under restraint? Why abandon the ship which has carried us and is carrying us safely for one that is doomed to sink early in the voyage?

Those who timidly express a distrust of these proposed changes are met with the withering question: "Are you afraid to trust the people?" This challenge suffices to utterly destroy political rivals and to entirely silence those ambitious but timid souls who seek popular favor, but to those of us who merely wish to reach an intelligent decision on a most vital question it presents neither reason or argument. It may answer the selfish purposes of those who seek public office, through popular favor, but it furnishes no aid to us in making an intelligent and satisfactory answer to the question before us. We know that those men who clothe us with perfect wisdom and perfect judgment, at all times, are self-deceived or dishonest with us. Let us not deceive or be dishonest with ourselves. We know that men are imperfect. They always have been and always will be creatures of passion and prejudice and prone to hasty and mistaken judgments. We may well beware of those who flatter us for our favor. Hamilton uttered a timely warning when he said: "A dangerous ambition more often lurks behind the specious mark of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government. History will teach us that the former has found a much more certain road to the intro-

duction of despotism than the latter, and that of those men who have overturned the liberties of republics the greatest number have begun their career by playing an obsequious court to the people, commencing demagogues and ending tyrants."

Shall we forget the name and words of Washington? He has not been forgotten elsewhere. The French people did not forget him. After they had secured their freedom they sent the key to the Bastille to him at his home at Mt. Vernon, where it still remains as a token of their gratitude for his general services to them and to the cause of human freedom throughout the world. None realized better than Washington the imperfections of mankind and the impracticability of a pure democracy, and the necessity for a restraint upon human passions. Did he not voice the wisdom of the ages and the common experiences of men when he said: "It is on great occasions only, and after time has been given for counsel and deliberate reflection that the real voice of the people can be known." Are not his opinions still entitled to weight with us? Shall we not heed his words: "Republicanism is not the phantom of a deluded imagination. On the contrary, laws, under no form of government are better supported, liberty and property better secured, or happiness more effectually dispensed to mankind. * * * If in the opinion of the people the distribution or modification of the constitutional powers be, in any particular wrong, let it be corrected by an amendment, in the way which the Constitution designates. But let there be no change by usurpation; for, though this

in one instance may be the instrument of good, it is the customary weapon by which governments are destroyed. The precedent must always greatly overbalance, in permanent evil, any partial or transient benefit which the use can at any time yield. * * * Towards the preservation of your government, and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown. * * * This government, this offspring of our choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of liberty. * * * The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."

Do we not owe it to ourselves before abandoning our plan of government for another also to carefully weigh these

words of Lincoln: "Before entering upon so grave a matter as the destruction of our national fabric, with all its benefits, its memories and its hopes, would it not be wise to ascertain precisely why we do it? Will you hazard so desperate a step while there is any possibility that any portion of the ills you fly from have no real existence? Will you, while the certain ills you fly to are greater than all the real ones you fly from—will you risk the commission of so fearful a mistake?"

Are we ready to submit ourselves to the doctrine that the majority as they express themselves from time to time are always right? Are we ready to agree that no obstructions should be placed upon the dominating will of an existing majority? And by a majority we do not mean a majority of all the people, but of the electors. The electors are but one-fifth of the people and a majority at any election means no more than one-tenth of the people, who are affected. Are we ready to say that all public officers shall follow the wish of the majority of electors? That courts shall construe statutes and constitutional provisions in accordance with the will of the majority as they shall express it at any time? Are we ready to say that controversies shall be decided by our judicial tribunals as the majority of the electorate shall will? Will we agree that the guarantee to individuals and to minorities contained in the federal Constitution shall be subject to the control of an impassioned majority? If we approve this proposed plan of governing through the unrestrained power of the dominant majority we must also approve the conse-

quences which may follow it. Are we ready, at the command of a majority of electors to give up our religious freedom and agree to the establishment of a state religion? Are we prepared to surrender the rights of free speech and the freedom of the press—the right to peaceably assemble and the right to petition—whenever a prevailing majority of electors shall so decide? Will we permit a majority to deny to us the great liberty writ, the writ of habeas corpus? Shall we agree that a majority may pass bills of attainder and make acts which are innocent to-day crimes to-morrow? Are we ready to agree that a majority may provide that soldiers shall be quartered in our homes without our consent in times of peace? That our persons and houses and effects shall not be free from unreasonable searches and seizures? That warrants may issue without probable cause—that we may be held to answer for crimes without a presentment—that we may be put twice in jeopardy for the same offense—that we may be compelled to witness against ourselves in criminal cases—that our property may be taken for public use without just compensation—that we may be de-

prived of our life, liberty and property without due process of law—that we shall have no right to speedy and public trial by an impartial jury—that we shall have no right to be confronted by the witnesses against us—that we shall have no right to process to compel the attendance of witnesses in our favor, or to have counsel to aid us in our defense—that excessive bail may be required and cruel and unusual punishments may be inflicted?

These are some of the rights guaranteed to us by the federal Constitution, which the promoters of the present revolution ask us to imperil by adopting the purely democratic form of government.

Our ship of state is proof against external force. It is not proof against internal violence. Shall we now, against the judgment of the founders of this republic; against the verdict of history and our own experience, remove the restrictions which have thus far secured us against the violence of passion and prejudice? Shall we deliberately expose ourselves to the fate which has overtaken all such experiments in human government?

In Defense of the Judiciary

By the Editor

Constitutional government cannot be maintained without the aid of an able, fearless, and independent judiciary. And to secure a true and effective independence of the judiciary, it is necessary that at least the highest court in each system shall be created by the constitution itself, and its jurisdiction defined and conferred by the same instrument. Where this is the case, the court cannot be abolished by a mere act of ordinary legislation, nor stripped of its authority to hear and determine controversies affecting the rights of the individual over against the powers of government. It is in vain to write into the constitutions the most solemn guarantees of liberty if the judges lack the courage or the will to enforce them. But on the other hand, though judges bear neither the purse nor the sword, and their only strength is in the voice of reason, yet if they will incorruptibly do justice, neither swayed by personal hopes or fears nor heeding the outcry of the multitude, not even the meanest man who invokes the protection of the law can be unjustly deprived of even the meanest thing that is his. If legislatures, if magistrates, if the popular majority will disregard those constitutional provisions which safeguard the liberties and immunities of the citizen, who shall make him secure in the enjoyment of his rights? None but the courts. Therefore it is their very high function to scrutinize the validity of any act of legislation, when properly challenged before them, in the light of its conformity to the fundamental law,

and to pronounce it void and of no effect if it shall be found to violate the constitution.

This principle would seem to be self-evident. Yet in recent years a clamor has been raised against the exercise by the courts of what has hitherto been thought their unquestionable right and duty. It is demanded that the will of the people shall prevail, be it right or wrong, just or unjust, constitutional or unconstitutional. It is asserted that the possession by the courts of justice of the authority to annul a statute on constitutional grounds, contrary to the opinion of the legislature which enacted it or of the people who approve it, is "a flat and uncompromising negation of democracy." This attitude, it is stated, is "an unconscious reflection of the growing popular tendency to sweep away all barriers and to change a representative republic into a direct democracy." Proposals to amend the Constitution of the United States so as to forbid the federal courts to adjudge any act of Congress invalid for violation of the Constitution have been introduced in Congress. The same end has been sought to be accomplished by resolutions, similarly introduced, to the effect that any United States judge who shall pronounce against the validity of an enactment of the national legislature shall be deemed "guilty of usurpation of office" and be forthwith removed. The opinion has been expressed by many individuals and by various bodies and associations that any judge pre-

suming thus to set aside an act of legislation should be compelled to resign or be thrown out of office. And this exercise of the judicial power—though to the judge it is only the performance of a duty which he would gladly avoid if his oath of office permitted—has been denounced as an unwarrantable usurpation of power even by certain men of standing as publicists, lawyers, or judges. A Senator of the United States is reported to have declared in a recent public address: "Some power must be charged with the responsibility of saying what is or is not constitutional. That power is vested in the Congress of the United States and is not vested in any court whatever." And the same speaker is represented as having publicly asserted on another occasion that the assumption by the Supreme Court of authority to pronounce a statute invalid if clearly in contravention of the Constitution was "unparalleled impudence."

Since the great name of Lincoln has been invoked by those who denounce the courts for exercising this power and performing this duty, in respect to his criticisms upon the decision of the Supreme Court in the Dred Scott Case, it may be well to quote what an eminent authority has said on this point. "Mr. Lincoln, the man destined to occupy the presidential chair, arraigned the court most severely. He regarded the dictum (as to the power to exclude slavery from the territories) as a political rather than a judicial matter. The only remedies which he proposed, however, were either to induce the court by argument to reverse its opinion, or to induce the people by argument to

override it by a constitutional amendment in the manner provided in the Constitution itself. All this was regular, proper, legitimate, and conservative, and not intended to introduce or recommend any novel method for solving constitutional questions." (Professor Burgess, "The Reconciliation of Government with Liberty," p. 318.)

Moreover, men high in the councils of the nation have not hesitated to advocate the fantastic notion of a popular reversal of judicial decisions of this character by a "recall" election. And provisions for such a reversal on such a recall have actually been incorporated in one of the newest of our state constitutions, that of Colorado adopted in 1913, which declares that "none of the courts except the Supreme Court shall have any power to declare or adjudicate any law of this state * * * as in violation of the Constitution of this state or of the United States." And when the Supreme Court adjudges a law invalid, "before such decision shall be binding, it shall be subject to approval or disapproval by the people. * * * All such laws or parts thereof submitted as herein provided, when approved by a majority of the votes cast thereon * * * shall be and become the law of this state notwithstanding the decision of the Supreme Court."

Let us examine these contentions. And first, there are those who say that the courts have here been guilty of a usurpation of power, and that such a power was not granted by the Constitution of the United States, and was never intended to be. The Constitution itself refutes this. For it de-

clares that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land." Hence a law which is *not* made in pursuance of the Constitution is *not* the supreme law of the land. But if a law which is the supreme law of the land and a law which is not the supreme law of the land are found to be in conflict with each other, which must prevail and which must give way?

But it has been asserted by some persons whose utterances are ordinarily entitled to respectful consideration, and whose learning should have guarded them against historical blunders, that a proposal to confer upon the judges explicit authority to pass upon the constitutional validity of acts of Congress was brought forward in the constitutional convention of 1787, and was voted down by decisive majorities more than once. But contemporary records disclose the fact that the proposition which was thus disapproved was for the erection of a "council of revision," comprising the President and the judges of the Supreme Court, to which acts passed by Congress should be submitted for their consideration, with the provision that if they disapproved an act so submitted (on any ground whatever, with no necessary reference to its constitutional validity), it should not become a law unless again passed by both houses and with more than a majority of votes. This was merely a proposal to associate the judges with the President in the exercise of the veto power, and it is not surprising that it should have been defeated, but that it should have received any support at all.

But what is more important is that the debates on this proposal, as recorded in Madison's Journal, show that the leading men of the convention not only understood that the courts would possess the authority to condemn laws passed in violation of the Constitution, but regarded this as a salutary power wisely bestowed. For instance, James Wilson of Pennsylvania, who favored the council of revision, "observed that it had been said that the judges, as expositors of the laws, would have an opportunity of defending their constitutional rights. There was weight in this observation, but the power of the judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive, and yet may not be so unconstitutional as to justify the judges in refusing to give them effect." And George Mason of Virginia, on the same side, said that the judges "could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive, or pernicious, which did not come plainly under this description, they would be under the necessity as judges to give it a free course." And Luther Martin said: "As to the constitutionality of laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws." On the other side, Elbridge Gerry, of Massachusetts, opposed the inclusion of the judges in the council of revision, "as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved (he said) a power of deciding on their constitutionality. In some of the states the judges had ac-

tually set aside laws as being against the constitution. This was done, too, with general approbation." Another proposal made in the constitutional convention was that Congress should have authority to veto laws passed by the states which, in the opinion of Congress, should be contrary to the national constitution or to treaties. Roger Sherman thought this provision unnecessary "as the courts of the states would not consider as valid any law contravening the authority of the Union and which the legislature would wish to be negatived." Madison, tacitly admitting the right and duty of the state courts to adjudge such acts invalid, said that "confidence cannot be put in the state tribunals as guardians of the national authority and interests; in all the states these are more or less dependent on the legislatures." And Gouverneur Morris remarked that "a law that ought to be negatived will be set aside in the judiciary department." In fairness it ought to be added that, in the progress of the debates, John Francis Mercer, of Maryland, stated that he "disapproved of the doctrine that the judges as expositors of the Constitution should have authority to declare a law void; he thought laws ought to be well and cautiously made and then to be uncontrollable." And John Dickinson, of Delaware, "was strongly impressed with the remark of Mr. Mercer as to the power of the judges to set aside laws. He thought no such power ought to exist." But Mercer's part in the convention was not one of special brilliance, nor did his occasional participation in the debates exhibit either acuteness of intelligence or profundity of thought. His

criticisms of the proposals of others were frequent and invariably adverse, but he contributed no constructive ideas of his own. Dickinson, who merely echoed him in this matter, likewise betrayed the superficiality of his views by adding (apparently from a prevision of the fact that legislatures would certainly pass laws in violation of the Constitution) that "he was at the same time at a loss what expedient to substitute." These were the only voices raised in opposition to the doctrine of judicial review of statutes with reference to their constitutionality.

If we read the debates in the several state conventions upon the question of adopting the Constitution, we shall find the same opinion prevalent among the men of eminence in that day. In the South Carolina legislature, Charles Pinckney, who had been a member of the convention, avowed in the strongest terms the doctrine that it was not only proper but necessary to concede to the Supreme Court the final authority in determining upon the constitutional validity of the acts of Congress. In the convention of Connecticut, Oliver Ellsworth, a member of the convention and afterwards Chief Justice, said: "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void, and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it void." In the Virginia convention, Patrick Henry expressed a strong opinion in favor of the right of the judiciary to decide upon the constitutionality of laws, saying among other things, "I take it as the highest encomium on this country that the acts of the

legislature, if unconstitutional, are liable to be opposed by the judiciary." And in the same convention James Madison voiced the same opinion. Luther Martin, in a letter to the Maryland convention, said: "Whether any laws of Congress or acts of the President are contrary to or warranted by the Constitution rests only with the judges who are appointed to determine." On the power and duty of the judiciary with reference to unconstitutional laws, the views of Alexander Hamilton, who had been a member of the convention, are fully expressed in the "Federalist." And Thomas Jefferson, in a letter written in 1789, said: "In the arguments in favor of a declaration of rights you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary. This is a body which, if rendered independent, and kept strictly to their own department, merits great confidence for their learning and integrity."

Several of the states themselves, through resolutions of their legislatures, at a very early day, approved the doctrine of the federal judiciary as the supreme and final arbiter in questions concerning the constitutional validity of acts of Congress. The Kentucky and Virginia resolutions of 1798 and 1800 (which were called forth by the Alien and Sedition Laws) asserted the right of the several states to determine for themselves whether any given act of Congress was constitutional and binding upon them. But these resolutions were disapproved, and counter resolutions were adopted, in answers returned to the Kentucky and Virginia authorities, by the legislatures of Massachusetts, Delaware, Rhode Island,

New York, Connecticut, New Hampshire, and Vermont. And it does not appear that any other state accepted or approved the declaration of Virginia and Kentucky. In 1810, Pennsylvania proposed the creation of another tribunal than the Supreme Court to determine disputes between the federal and state governments. But at that time Virginia affirmed that the Supreme Court was the only proper tribunal for that purpose, and this opinion was concurred in by New Hampshire, Vermont, North Carolina, Maryland, Georgia, Tennessee, and New Jersey, and no state approved the Pennsylvania amendment.

But it is not to be supposed that this power of our courts was created by the Constitution of the United States. It may be justified by that instrument, as we have already seen. But there are several well-authenticated instances, of which at least seven are recorded, in which the courts of the states had declared against the validity of acts of their legislatures, on account of repugnance to their constitutions, before the Federal Constitution was adopted. Therefore if we regard the power as expressly given by the Federal Constitution to the federal courts, it was not an invention of the framers of that Constitution, but was in line with precedents already furnished by the states. And if we are to consider that the federal courts claimed the power as an implication from their constitution and office, they had authority for the claim in the previous action of the state courts. And before the Constitution had been in operation a dozen years, this right and duty of the courts had been asserted on several different occa-

sions by the federal judges, either in the application of the principle to a concrete case before them or in the way of a solemn and careful pronouncement of judicial opinion from the bench. These early opinions are entitled to great consideration as fragments of history, because some of the judges who rendered them had been members of the constitutional convention and certainly understood its intentions in the matter, while all of them were familiar with the views of the leading statesmen and citizens who composed or surrounded the convention or voted to accept the result of its labors.

But it remained for the great Chief Justice, John Marshall, to vindicate the authority of the courts in words so clear, and with logic so convincing, that his argument has never been successfully answered. "It is emphatically the province and duty of the judicial department," said he, "to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution. If both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any

ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet in practice completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure." (*Marbury v. Madison* (1803) 1 Cranch, 137.)

There are others of our fellow citizens who admit the historical and textual grounds supporting the judiciary in the exercise of this power, but denounce it as an abuse. They say it is undemocratic, that it obstructs the will of the people, and that therefore it should be taken away. It should be clearly apparent from what has already been said that the real negation of democracy is not found in the grant of this power to the courts, but would be found in its abolition. For that would lodge in the hands of the legislature what Marshall rightly called "a practical and real omnipotence." And where

one of the organs or branches of a government holds omnipotent power, that government may be called almost anything you will, except a democracy.

But cannot the representatives of the people be trusted to respect the Constitution and keep within the limits it has assigned for them? The unimpassioned voice of history replies that they cannot. Again and again have our legislative bodies, both state and national, grossly violated the constitutions and forced upon the courts the unwelcome task of pronouncing their enactments void. And it should be remarked that there is altogether too much of a disposition on the part of legislatures to enact statutes in spite of their own grave doubts of the constitutional validity of what they do. Let it appear that there is an insistent popular demand for legislation on a given subject, though the substance of it may hang balanced on the edge of unconstitutionality, and legislators are very prone to try the experiment of enacting it and of "putting it up to the courts" to say whether it is valid. This tendency is perfectly illustrated by the following extract from a speech delivered in the House of Representatives by a once prominent member from New York: "Our first step must be in the direction of legislation. The only way we can ascertain definitely whether a law which we believe will prove effective is constitutional or unconstitutional is not by abandoning ourselves to a maelstrom of speculation about what the court may hold, or has held on subjects more or less kindred, but to legislate, and thus to take the judgment of the court on that specific proposal. We can tell

whether it is constitutional or unconstitutional when the court pronounces upon it, and not before." And so again, in the recent debates in the Senate on the child-labor bill. Senator H. declared that the measure was unconstitutional, and recalled the fact that Senator G. had said so some months before. To this Senator G. replied that the people of the country wanted the bill passed, and that he still had doubts about its constitutionality, but was willing to vote for it and leave that question to the courts.

"The duty of the judiciary to declare unconstitutional laws void, and the conscientious firmness with which that duty usually been performed," says an eminent authority, "have led to some curious and unexpected results, not the least remarkable of which is the manner in which the legislature is sometimes disposed to cast the responsibility which properly belongs to it upon the courts. It must and will often happen that the popular clamor will call for doubtful legislation, and men who depend upon the popular voice for their positions do not always care to take the consequences of an unpopular discharge of duty, and are therefore easily induced to assent to legislation which their judgment assures them will be void, when they know that behind them are the courts which will refuse to enforce it. That this is a plain and most reprehensible evasion of duty there can be no question, and the consequences are more serious in many cases than might readily be supposed. For in every instance in which an enactment is pronounced unconstitutional, there is an apparent con-

flict between the legislative and judicial departments of the government; and as the public have a right to suppose that each has given to the subject its best judgment, the fact that the legislative conclusion is one way and the judicial the other must necessarily lower in some degree the respect which the public would be inclined to have for the latter, and the confidence with which they would otherwise rely upon it. But every good citizen is interested in giving to a just and fearless discharge of judicial authority a free and liberal support, and whatever tends to lessen the hold of the judiciary on the public confidence, in the like degree diminishes its ability to perform its functions effectually, and tends to produce disorder in the commonwealth. An injury to good government is consequently done in every instance when legislators adopt a statute which they believe to be unconstitutional, since in so doing they not only evade a plain duty, but they also require of the courts the performance of an obnoxious and unpopular task which ought not to be cast upon them, and which is rendered doubly unpleasant by the apparent conflict of opinion between the two departments." (Thomas M. Cooley, in a note to Story on the Constitution, vol. 2, sec. 1576.)

But if a law-maker will thus tamper with his conscience and thus lightly regard his oath to support the constitution, what assurance can there be that he would rigorously obey the letter of the fundamental law if no court had power to test and try the lawfulness of his acts?

If we are still in doubt upon this subject, let us hear what some of the defenders of the judiciary have had to say, and especially let us get beyond the limits of our own country. A recent writer correctly observes that "there is no feature of the American government which has been so generally admired abroad, nor which is now undergoing such drastic criticism at home, as the federal judiciary." (Young, "The New American Government," p. 275.) Former President Taft has said: "The greatest advantage of our plan of government over every other is the character of the judicial power vested in the Supreme Court. The statesmen and historians of Europe look upon it with wonder and amazement, speak of it with profound approval, and regard it as the chief instrument in the maintenance of that self-restraint which the people of the United States have placed upon themselves and which has made this government the admiration of intelligent critics the world over." Francis Lieber said that the functioning of our courts of justice in this respect is "one of the most interesting and important evolutions of the government of law, and one of the greatest protections of the citizen. It may well be called a very jewel of Anglican liberty, one of the best fruits of our political civilization." ("Civil Liberty and Self-Government," p. 162.) So also Lord Bryce. "The Supreme Court is the living voice of the Constitution, that is, of the will of the people expressed in the fundamental law they have enacted. It is therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from

hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guarantee of the majority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction." ("The American Commonwealth," vol. 1, p. 266.) And Sir Henry Maine has told us that the success of this experiment has blinded men to its novelty. "There is no exact precedent for it either in the ancient or in the modern world. The builders of constitutions have of course foreseen the violation of constitutional rules, but they have generally sought for an exclusive remedy, not in the civil, but in the criminal law, through the impeachment of the offender. And in popular governments, fear or jealousy of an authority not directly delegated by the people has too often caused the difficulty to be left for settlement to chance or to the arbitrament of arms." ("Popular Government," p. 218.) So it has been remarked by Sedgwick that "the federal judiciary as a matter of fact has played for more than a century exactly the part assigned to it by the framers of the Constitution. It has been powerful by weight of reasoning, it has been independent in the exercise of power, and it has been uncorrupted. It has vindicated the Constitution, and been a wonderful proof of what human contrivance and forethought can do in directing the operation of government through the play of ordinary motive in such a way that it shall prove responsible to the people for the efficient performance of

the work assigned to it." ("The Democratic Mistake," p. 106.)

And again, in this as in other respects, our federal Constitution has received the tribute of "the sincerest form of flattery." The power and duty to adjudge laws void if contrary to the Constitution are vested in the supreme judicial tribunals of Argentina, Brazil, Colombia, Cuba, Mexico, Nicaragua, Peru, Uruguay, and Venezuela. And if a final word of testimony be needed, one of the most advanced advocates of a thoroughgoing democracy has remarked that much of the current criticism of the courts "is more vigorous than illuminating. It is a matter of common knowledge that the people resort to the courts for protection against the tyranny or folly of the legislative body quite as often as the reactionary interests resort to them for protection against the demands of political and social progress. When a fleeting majority in the legislature attempts to intrench itself in power by obnoxious legislation or to barter away the people's inheritance or to misapply public funds, there is great satisfaction to the public in being able to apply to the courts for protection against the violation of constitutional guarantees." (Delos F. Wilcox, "Government by All the People," p. 74.)

Many people of average intelligence but defective education are now declaiming bitterly against the courts as committed to policies of obstruction or as opponents of progress. They err greatly in representing the judges as a sort of third party in legislation, whose permission must be obtained before the will of the people, enacted into a stat-

ute, can be done, and who put the "judicial veto" upon any law which they, for any reason whatever, dislike. Of course this is pure nonsense. There is no such thing as a judicial veto. But on the contrary, when the courts are asked by litigants to pronounce a statute unconstitutional, they proceed according to certain well-settled rules, which are never departed from, and which are familiar to all lawyers, though naturally not so much so to men of other professions. A technical discussion or illustration of these rules would not be appropriate in this connection, but they may here be stated briefly and categorically.

And first, no court is at liberty to pronounce a statute unconstitutional unless the fact that it is repugnant to some particular designated clause or portion of the constitution is distinctly alleged and clearly shown, or unless it is made indubitably to appear that the statute is contrary to some one or more of the implied limitations and restrictions upon the power of the legislature. Nor can the spirit of the Constitution or its supposed general purposes be invoked, apart from the words of the instrument, to invalidate a statute. For this reason, United States District Judge Hough, in speaking of certain provisions of the immigration law, refused to adjudge it unconstitutional, although he said: "For some years I have regarded it as *harshly opposed* to the spirit of the Constitution, and perhaps capable of use in derogation of earlier treaty rights of citizens of friendly nations, yet entirely within the congressional power of regulating

foreign commerce." (155 Federal Reporter, 428.)

In the next place, to induce a court to pass upon the constitutionality of a statute, the question must arise in the course of an actual and genuine litigation. No one can get the opinion of the court on such a question by making up a friendly issue with a pretended adversary. Of course a "test case" may be presented, but it must be a real suit between real antagonists. And as a corollary to this rule, a statute will not be declared invalid on the application of a mere volunteer. The attack must be made by some person whose rights or interests are directly affected by it. This is more fully explained in a recent decision of the Supreme Court, in which it was remarked by Mr. Justice Holmes that "there is a point beyond which this court does not consider arguments of this kind for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that, unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so because if, for any reason or as against any class embraced, the law is unconstitutional, it is void as to all. If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the state court might read into general

words, or how far it may sustain an act that partially fails." (204 U. S., 152.)

Again, the question may be raised after the act is passed, not before. In a few of the states, it is true, the constitutions permit the legislature or executive department to take the opinion of the supreme court upon the validity of a proposed or pending measure. But the court does not answer as a court, but as a constitutional adviser. Its opinion is always designated as "the opinion of the justices," not of "the court." The distinction is important, because it follows that an opinion so given is not conclusive of the rights of individuals, nor binding on the court itself, as a precedent, in subsequent litigation. But even this is not permitted under the federal system. It has not been attempted since 1793, when Washington asked the advice of the Supreme Court on certain questions of law, which the court respectfully declined to give.

Another rule is that the question of constitutionality will not be decided where it is only of academic interest in the case, but only where its solution is imperatively necessary to the right disposition of the controversy. The decision will be rested on grounds which do not involve a determination as to the validity of the statute, if there be any such in the case. It is only when the question of the constitutional authority of the legislature to enact the statute is the very gist and marrow of the case that the court will give its judgment on this point.

So also, a decision against the validity of the statute will be avoided, if it

is possible, by putting such a construction upon it as will make it conform to the Constitution. To this end, the court will even disregard the natural and usual import of the words used if it is possible to adopt another construction sustaining the statute, which shall not be strained or fantastic. "It is elementary," says Chief Justice White, "when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity." And: "Where a statute is susceptible of two constructions by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter." (213 U. S., 366.)

Every presumption is in favor of the constitutionality of an act of the legislature. Every reasonable doubt must be resolved in favor of the statute, not against it, and the courts will not adjudge it invalid unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable. "It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt, a law must be sustained." (Justice Holmes, in 207 U. S., 79.) "The legislature or local assembly acting under its authority is the governing body of the state or that portion thereof. It is its primary duty to determine what the public welfare demands, and every presumption must be indulged in its

favor. It follows therefore that unless it is *palpably clear* that its determination is wrong, it must be allowed to stand." (148 Federal Reporter, 533.)

Another important rule is that if a statute was passed in due form, and its validity is challenged in the courts, no inquiry will be permitted, nor any argument heard, concerning the motives which actuated the legislative body. It cannot be argued or shown to the court that the legislature acted unadvisedly or mistakenly, or upon an insufficient study of the subject-matter, or that it was induced to enact the law by deception practised upon it, or even that fraud, bribery, or corruption entered into the making of the law. For example, in the determination by a court of the constitutionality of a railroad rate statute of a state, no consideration will be given to the argument that the subject was not maturely considered by the legislature before passing the act. "All testimony and argument bearing upon the question as to what consideration the legislature of Missouri gave to these enactments is entirely immaterial. Much was said in argument as to the message of Governor Hughes of New York two years ago in declining to approve the two-cent fare statute of that state. Governor Hughes had the moral courage to veto a measure of popular favor because, as he believed, the question had not been fully considered. But the relations of a governor to proposed legislation, and those of a court to legislation consummated, are entirely different." (168 Federal Reporter, 353.)

But more than this—a statute cannot be declared void on considerations go-

ing merely to its policy, propriety, wisdom, or expediency. These are considerations for the legislature, but not for the court. As the present Chief Justice has remarked: "No instance is afforded from the foundation of the government where an act which was within a power conferred was declared to be repugnant to the Constitution because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust." And in another case: "Whether the law is open to just criticism as a piece of legislation is of course a matter upon which we can express no opinion. The validity of an act passed by the legislature must be tested alone by the Constitution; the courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy." (183 Federal Reporter, 681.) Natural justice is supposed to be adequately guaranteed by the Constitution, and public policy exists only as it is found in the Constitution and the laws.

And finally, it is a rule that if some of the parts or provisions of a statute are plainly contrary to the Constitution, but not so the rest, the invalid parts will be dissected out, if possible, and the remainder sustained. That is, if the invalid portions can be disentangled from the rest, and if, after their excision, there remains a complete, intelligible and valid statute, capable of being executed and conforming to the general purpose of the legislature as shown in the act, it will not be adjudged unconstitutional *in toto*, but sustained to that extent.

The National Association for Constitutional Government

The National Association for Constitutional Government is a non-partisan, patriotic society, formed for the purpose of advocating the maintenance of constitutional government in the United States. It is opposed to the radical and even revolutionary ideas which have been so widely propagated in recent years, because it believes them to be highly dangerous to the liberties of American citizens and subversive alike of the true principles upon which written constitutions are founded and of the system of representative government under which our country has grown and prospered. It holds that the function of a constitution is not merely to prescribe the form of government and the chief political institutions of a country, but to secure, inviolably and forever, those fundamental liberties and immunities of the citizen without which no free government can be perpetuated. These rights, it maintains, are inalienable; they are the corner-stones of liberty; they are not the gift of the state, but the antecedent possession of the citizen; they cannot be made subject to the fluctuating will of a temporary majority. Echoing the famous declaration of the constitutions of Kentucky and Wyoming, the Association asserts that "absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority."

The Association believes that the processes of amending and revising constitutions should be difficult, not

easy; for it is only by this means that due care and deliberation can be brought to bear upon the most important of all political problems. Operative surgery, as applied to the vitals of a nation or a state, should not be committed to hasty tempers or rash hands. The Association believes that when a change in the organic law is demanded by a real, sober, deliberate, and widespread public opinion, and is in correspondence with a genuine evolution in the life and thought of the people, it can, it should, and it will be made. But it conceives that men are in need of enlightenment when they see no radical distinction between a constitution and an ordinary act of statutory legislation. It does not concede that the national and state constitutions should be made flexible or that they should become responsive to merely ephemeral changes in the popular will. It sees nothing but disaster as the necessary consequence of the inconsiderate act of casting the constitutions into the melting pot.

Aside from this general principle, the Association as a body neither favors nor opposes the adoption of any specific amendment to either the Constitution of the United States or the constitution of any state. Its members exercise their individual judgment in such matters. It is not allied with any interest, nor influenced, much less controlled, by the advocates or by the opponents of any political proposal, school of thought, or social, moral, or political reform. It is strictly and absolutely non-partisan. It has no con-

cern with the party affiliations of its members. It welcomes to its ranks all friends of constitutional government, without inquiring where, in the practical administration of government, they may bestow their allegiance. Moreover, its mission is educative, and not controversial. Its publications are meant to be informative, not polemic. For it is persuaded that a great part of the revolutionary talk and writing, now unhappily current in regard to the grave problems of American democracy, is not attributable to any real contempt for government by law, still less to any malicious desire to destroy the priceless heritage of American freedom, but simply to an amazing ignorance (or forgetfulness) of the true principles of constitutional government, the history of representative institutions, and the story of the immemorial struggle of right against might.

But let it not be thought that these tendencies manifest themselves only in the inarticulate murmurs of discontent or in the vaporings of political theorists. If that were all, the National Association for Constitutional Government would have no substantial reason for its existence: it might as well be an academic debating club. What is actually true is that there are several millions of Americans who advocate what the Association deprecates, who condemn those things which it holds most valuable and important. These men have their organizations; they have perfectly definite ideas as to the structural changes which they desire to effect in American institutions and in the constitutions; and they are energetic and persistent in presenting their platforms

to the public mind. There is no exaggeration in the statement that our republican institutions are gravely menaced. The Constitution is in danger of assassination in the house of its friends. For this reason the Association believes that it has an active duty to perform. It places its reliance on the sober common-sense and the real patriotism of the great mass of the American people. It cannot suppose that they will be content to play the part of idle spectators while their institutions are overturned and their liberties dissipated. But they must be made to realize the danger. For this campaign of educating the people and of maintaining the principles of constitutional government, the Association invites the aid of all right-minded men, of all men who would not willingly see the wise and just provisions of our forefathers become a relic of the unlamented past.

There is nothing reactionary in this movement. To pay attention to the teachings of history and to profit by the lessons of experience, to hold fast those things which have endured the test of time and proved their worth by their fruits, is not to be reactionary. The true reactionaries are those who would return to a long discredited past, who would cast aside the safeguards of individual liberty, break down the representative system, and restore the chaotic rule of an irresponsible and absolutistic democracy. The principles of the Association are conservative, but not illiberal. It is frankly conservative in the sense of being concerned for the preservation of all that is really valuable in our system of government. For the institutions of civil liberty are

not subject to periodical revision, nor changeable with the rising and falling tides of political expedience. The will to power is written in the book of human nature, and for that reason the affirmation of the rights of men is written in the Constitution once and for all time. Nothing in the credo of the Association is in any wise opposed to progressive action in governmental action or in legislation, provided only that it is based on an adequate survey of conditions and consequences, and that the guarantees of individual liberty shall not be sacrificed. Its members, in common with all other good citizens, ardently desire that the forces of government should be employed to promote the general welfare. But they believe that—in so far as this can be accomplished by legislation—it is to be brought about by just and salutary laws, constitutionally ordained, impartially applied, and faithfully obeyed. To quote from one of the publications of the Association: "It is yet to be demonstrated that there is any truly beneficial social reform that is prohibited or obstructed by the national Constitution. When that is demonstrated, it will be time to consider how far, and in what manner, that obstruction should be removed. If it is a real demonstration, if it is of a nature to produce conviction after deliberate consideration, there is nothing in the aims and purposes of the Association to prevent the adoption of such a reform. The attitude of the Association is that no dim-

inution of the present constitutional guarantees should be permitted without deliberate and reasoned consideration, and that every change should be considered upon its own specific merits."

In fine, the purposes of the National Association for Constitutional Government are best defined in the second article of its own constitution, which is as follows: "It shall be the object of the Association to propagate a wider and more accurate knowledge of the Constitution of the United States, and of the distinctive features of constitutional government as conceived by the founders of the Republic; to inculcate an intelligent and genuine respect for the organic law of the land; to bring the minds of the people to a realization of the vital necessity of preserving it unimpaired, and particularly in respect to its broad limitations upon the legislative power and its guarantees of the fundamental rights of life, liberty and property; to oppose attempted changes in it which tend to destroy or impair the efficacy of those guarantees, or which are not founded upon the mature consideration and deliberate choice of the people as a whole; and to this end, to publish and circulate appropriate literature, to hold public and corporate meetings, to institute lectures and other public addresses, to establish local centers or branches, and generally to promote the foregoing objects by such means as shall from time to time be determined upon by the Association or by its governing bodies."

The Constitutional Review

The Executive Committee of the National Association for Constitutional Government, at a recent meeting, determined upon the foundation of a periodical magazine, to serve as the organ or official publication of the Association, and directed that steps be taken forthwith for the preparation and issuance of the first number. The magazine now makes its initial appearance under the name of *THE CONSTITUTIONAL REVIEW*. It is the present intention that it shall be published quarterly, on the first of January, April, July, and October. But in view of the extensive field it has to cover, the volume of material which will probably be available for its uses, and the important work which the Association, chiefly by means of it, is striving to accomplish, it is hoped that it may soon be possible to issue it at more frequent intervals, perhaps bi-monthly or even monthly. That will depend upon the encouragement and support which it may receive from the members of the Association and from other friends of constitutional government. The *REVIEW* will be sent without charge to all the members of the Association, and to others it is offered at the very modest subscription price of one dollar a year.

The Association has hitherto sent to its members by mail, at irregular intervals, valuable papers, addresses, and other literature bearing upon the subjects in which it is interested and advocating the principles for which it contends. It is not intended altogether to discontinue this practice. But from

this time on the *REVIEW* will be the Association's chief means of communicating with its members, of keeping them informed of its activities, and of disseminating such arguments and such information as it may deem helpful to its cause, whether the same may relate to proposed or accomplished changes in the constitutions or to the manifestations of current thought and of political activity with reference to the great subject of constitutional government.

In pursuance of this policy, it is the intention of the *REVIEW* to publish in each number one or more leading articles, contributed by writers who are specially qualified to discuss the particular subjects of which they may treat, or who are acknowledged leaders in statesmanship and the philosophy of government. And since this is an age in which the drastic revision and amendment of the constitutions appear to be the mania of political experimenters, the panacea of political reformers, and at the same time the first resort of many high-minded men who sincerely desire to promote the general welfare, but who are not profoundly instructed as to the true place and functions of written constitutions in our system of government,—it will be an important office of the *REVIEW* to publish notices and reviews of amendments proposed to be made in the Constitution of the United States, and of the revision or amendment of state constitutions in so far as they may effect structural changes in the organic law, or may ap-

pear to be of more than merely local interest, and also accounts of the progress of constitutional government throughout the world.

Never before, perhaps, since the period of the formation and adoption of the Federal Constitution, has the science of government in all its aspects been so prominent in the public mind as at this day. Discussions of the representative system, of direct legislation by the people, of the nature and value of constitutions, of the processes for their amendment, of the interrelation of the departments of government, of the functions of the judiciary, and of the various problems of democracy are rife in the public press and in the columns of the magazines, as well as in the halls of legislation and in the arena of public debate. In order that its readers may keep abreast of this current of

thought and discussion, it is the purpose of the REVIEW to publish from time to time synoptical reviews of the most important articles on these subjects appearing in the contemporary magazines, and also authoritative reviews of such of the new books, relating to some phase of the general subject, as may appear to be of special interest or importance.

Contributions of original material, communications with reference to national or local events bearing upon the general subject-matter, and other correspondence are cordially invited from members of the National Association for Constitutional Government and from all other readers. All such communications should be addressed to "The Constitutional Review, 717 Colorado Building, Washington, D. C."

The Irreducible Minimum in Constitutional Government

To the mind of that profound jurist and accomplished statesman, Elihu Root, there are five fundamental characteristics of the American system of constitutional government, the unimpaired maintenance of which is essential to the preservation of our liberty and the progressive realization of our democratic ideals.* Conservative but not reactionary, recognizing frankly the changing conditions of modern life, welcoming to the council table the noble zeal of the idealist and the reformer, he yet reminds us that "religion, the philosophy of morals, the teaching of history, the experience of every human life, point to the same conclusion—that in the practical conduct of life the most difficult and the most necessary virtue is self-restraint. It is the first lesson of childhood; it is the quality for which great monarchs are most highly praised; the man who has it not is feared and shunned; it is needed most where power is greatest; it is needed more by men acting in a mass than by individuals, because men in the mass are more irresponsible and difficult of control than individuals." In this same admirable spirit of self-restraint, with calm, wise, and weighty words, free alike from noisy declamation and hot denunciation, Mr. Root approaches the task of stating the essentials of true constitutional government, and vindicating the existing American system as against counsels of destruction and the spirit of short-sighted experimentation. These are the five basic principles upon which he insists:

1. The representative system of government.
2. Protection of individual liberty by specific constitutional limitations.
3. The distribution of governmental powers and the imposition of such limitations upon each as will prevent the setting up of despotism.
4. The preservation, in the just balance of their powers and functions, of both the national and state governments.
5. The provision that the observance of constitutional limitations shall be essential to the validity of laws, this to be judged by the courts in each concrete case as it arises.

"Every one of these five characteristics of the government established by the Constitution was a distinct advance beyond the ancient attempts at popular government, and the elimination of any one of them would be a retrograde movement and a reversion to a former and discarded type of government." The main purpose of the volume is to meet and repel "an assault against existing institutions upon the ground that they do not adequately protect and develop the existing social order." And here of course it is necessary to recognize candidly the enormous changes which have taken place in the life and social order of our people since the Constitution was adopted, changes social, industrial, commercial, political, and one may even say geographical, in view of the improved means of intercommunication and the melting away

*"Experiments in Government and the Essentials of the Constitution," by Elihu Root. The Stafford Little Lectures at Princeton University. The Princeton University Press, 1913.

of state lines before the advance of trade. Obviously, legislation must mould itself upon new forms, or become antiquated and inadequate. But "the process of devising and trying new laws to meet new conditions naturally leads to the question whether we need, not merely to make new laws, but also to modify the principles upon which our government is based and the institutions of government designed for the application of those principles to the affairs of life."

And first, popular government is not inconsistent with representative institutions. On the contrary, free government cannot be carried on except by the aid of governmental institutions. The popular will cannot exercise itself directly except through a mob, nor get itself executed through an irresponsible executive. The notion is inadmissible, therefore, that the people can rule merely by voting, or merely by voting and having one man or group of men to execute their will. But on the other hand, error lies in the pathway of those who fail to recognize the limits which nature has set to the possible accomplishments of government. The millennium cannot be brought to earth by statutes. Laws may coerce or restrain conduct, but cannot write justice and righteousness into the hearts of men. The truth is that "the strength of self-government and the motive power of progress must be found in the characters of the individual citizens who make up a nation. Weaken individual character among a people by comfortable reliance upon paternal government, and a nation soon becomes incapable of free self-government and fit only to be gov-

erned: the higher and nobler qualities of national life that make for ideals and effort and achievement become atrophied, and the nation is decadent."

Between the two extremes—the despotism of a mob and a more or less benevolent one-man despotism—it is still possible to steer a safe course. But to do so it is imperatively necessary to hold fast those things which have been approved by time and experience. Seven centuries have elapsed since the foundation of popular rights was laid in Magna Charta, and all that time "we have been shaping, adjusting, adapting our system to the new conditions of life as they have arisen, but we have always held on to everything essentially good that we have ever had in the system. We have never undertaken to begin over again and build up a new system under the idea that we could do it better." Consequently we find "that our system of government, which has been built up in this practical way through so many centuries, and the whole history of which is potent in the provisions of our Constitution, has done more to preserve liberty, justice, security, and freedom of opportunity for many people for a long period and over a great portion of the earth, than any other system of government ever devised by man." The present problem, therefore, is to adapt our laws and the workings of our government to the new conditions which confront us, without sacrificing any essential element of our system or abandoning the political principles which have inspired the growth of our institutions.

This brings Mr. Root to a consideration of some of the new expedients and

experiments which have been proposed as a cure for the ills of the body politic, and particularly direct legislation by means of the popular initiative and the compulsory referendum. Passing by his explanation and defense of the representative system, it is important to note his remark that it is not necessary to assume that a trial of the initiative and referendum in national affairs would be destructive of our system of government. For they are not intended to supersede representative government, but to modify and control it. The trouble is that an engine of this kind, once set in motion, is likely to get out of hand and to outrun both the wishes and the expectations of its original movers. Nor does Mr. Root omit to call attention to the extreme difficulty of getting an intelligent popular verdict (as is often attempted under the initiative and referendum) upon an extremely complicated set of facts and conditions, to which only a highly technical and elaborate statute, carefully framed by experts, would fairly apply, or the sometimes unexpected or even disastrous effects of injecting new and crude acts of legislation into the over-swollen body of existing law, or the exhaustion and lassitude of the electorate which results from overloading the ballot with a mass of proposed legislation, or, finally, the deteriorating effect upon the quality of the legislative assemblies. "Between the new constitutions," he says, "which exclude the legislatures from power, and the referendum, by which the people overrule what they do, and the initiative, by which the people legislate in their place, the legislative representatives, who were formerly honored, are hampered,

shorn of power, relieved of responsibility, discredited, and treated as unworthy of confidence. The unfortunate effect of such treatment upon the character of legislatures and the kind of men who will be willing to serve in them can well be imagined. It is the influence of such treatment that threatens representative institutions in our country."

It is not possible, within the limits of this review, to follow Mr. Root into all the remainder of his argument in defense of the essentials of constitutional government. Stress is very properly laid upon the unique Anglo-Saxon conception of the rights of man as being his inalienable heritage, as being grounded in personality and not in his position as a constituent, as being individual and not collective, as being his antecedent possession, and not the gift or creation of the state. The necessity of apportioning the powers of government between the three grand divisions, the executive, legislative, and judicial, with proper checks and limitations upon each, is fully discussed, as is also the question of the relative duties and functions of the state and national governments—a question worthy of very serious consideration in these latter days, when the doctrine of "states' rights" survives as a matter of historical interest and the spirit of the "new nationalism" is abroad.

Finally, Mr. Root ably vindicates the place and power of the judiciary as a part of our constitutional system, and the authority and duty of the courts to pass upon the validity of acts of legislation. The proposals for the recall of judges and for the popular review

of judicial decisions (erroneously called the "recall of decisions") he receives with scholarly courtesy, but one's impression is that they emerge from the interview very much abashed. Some of the possible consequences of the latter proposal he indicates as follows: "The exercise of such a power, if it is to exist, cannot be limited to the particular cases which any man now living may have in mind. It must be general. If it can be exercised at all, it can and will be exercised by the majority whenever they wish to exercise it. If it can be employed to make a Workmen's Compensation Act in such terms as to violate the constitution, it can be employed to prohibit the worship of an unpopular religious sect, or to take away the property of an unpopular rich man without compensation, or to prohibit freedom of speech and of the press in opposition to prevailing opin-

ion, or to deprive one accused of crime of a fair trial when he has been condemned already by the newspapers. In every case the question whether the majority shall be bound by those general principles of action which the people have prescribed for themselves will be determined in that case by the will of the majority, and therefore in no case will the majority be bound except by its own will at the time."

In thus contributing to the service of his fellow citizens the ripe fruits of his experience and of his ample study of the science of government, Mr. Root has finely performed a duty of high patriotism. It is scarcely too much to say that in making his lectures available to the general reader, in a slim but handsome volume, the Princeton University Press has performed a like duty and rendered a similar service.

The Massachusetts Constitutional Convention

Not only the people of the state immediately affected, but those who are working for the revision or amendment of the constitutions of various other states, and indeed all students of constitutional government, will be profoundly interested in the work of the coming constitutional convention in Massachusetts. For the organic law of that commonwealth is the oldest living American constitution. Adopted in 1780, it was largely the work of John Adams, or at least subject to his personal and final revision. Though amended about fifty times, it has never been subjected heretofore to a revision in its entirety. But last fall, on a bill originating in the legislature and referred to the voters, it was decided to call a convention, its mandate being to "revise, alter, or amend the constitution." The governor has issued a proclamation for this purpose. The 320 delegates will be elected in May, the convention will assemble at Boston in June, and the result of their labors will be submitted to the people in November.

Notwithstanding the decisive vote in favor of the convention (217,293 to 120,979) it is evident that there is still a strong dissenting minority. Their views are expressed, with some emphasis, by the Springfield "Union" (Feb. 8th), which says: "The simple truth of the matter is that this state no more needs a brand new constitution than a cat needs two tails, a view that we have entertained from the first, and the correctness of which we do not believe is discredited, despite the popular vote in

favor of a wholesale revision. Ask the average man in what respect he is oppressed by the constitution, in what respect it deals unfairly with him, in what respect it prevents the doing of those things that ought to be done, or permits the doing of things that ought not to be done, and he will be stumped for an answer. The present method of amending the constitution is simple, direct, and effective, and under this method any needed change can be brought about." This opinion is shared by the Lowell "Courier" (Jan. 9th), which observes that "the new constitution, when it is ultimately offered, will stand or fall not by what the old constitution said, but by what the new one says—and in a very few clauses at that. If it goes in for state-wide prohibition, woman suffrage, an elective judiciary, and one or two other things, it will be decided upon solely for that. We suspect the variety of fads that will thus get into it will be quite enough to kill it, as has happened in most other states."

It is already evident that an attempt will be made to introduce into the constitution the initiative and the compulsory referendum, the proposal being that a referendum petition shall require the signatures of 15,000 voters, an initiative bill 20,000 signatures, and an initiated constitutional amendment 25,000. In this respect it will be observed that the plan differs from that in force in various western states, where the requirement is not of a fixed number of signatures, but of a certain percentage of the qualified voters. But what the

advocates of the initiative and referendum in Massachusetts are chiefly anxious for is a provision that the fate of a measure of direct legislation shall be decided by a majority of those voting upon that measure, as distinguished from the old Massachusetts tradition of decision by a majority of those voting in the election. In other words, shall direct legislation be made easy or difficult?

The act providing for the convention directs that the result of its work shall be submitted to the vote of "the people." The question is being very pointedly asked, are women "people"? It is probable that the legislature, if it adverted at all to the meaning which this word would carry in the act in question, meant that it should be taken in the sense ordinarily ascribed to it in any statute relating to popular elections, that is, the body of persons qualified by the existing law to exercise the elective franchise. That the legislature should have meant to include all citizens, male and female, above the age of twenty-one years is especially unlikely in view of the decisive defeat of the suffrage amendment in 1915. The suffragists accept this interpretation. Nor do they demand a vote on the new constitution for all women of lawful age. Their proposal is that the act should be amended by inserting a definition of the word "people," so as to include those women who are now entitled to vote in the election of school committees. But there is substantial doubt whether the legislature has any power to do this. Would it not amount to extending the franchise beyond the limits fixed by the existing constitution? Would not this be in effect an

attempted amendment of the constitution by act of the legislature? It is pointed out that persons who were not then qualified to vote at regular elections were granted, by an act of the legislature, the privilege of voting on the original constitution when it was submitted to "the people" in 1780. But the doubt persists, and the legislature is urged to ask for the opinion on this point of the justices of the Supreme Court. Massachusetts is one of the very few states in which the supreme judicial tribunal may thus be asked in advance to decide upon the validity of proposed legislation.

Considerable interest attaches also to the so-called "anti-sectarian" amendment which will be offered to the convention. This prohibits the use of public money in aid of "any church, religious denomination or religious society, or any institution, school, society, or undertaking, which is wholly or in part under sectarian or ecclesiastical control." An organization called the "American Minute Men" is conducting a state-wide canvass in favor of the adoption of this amendment, or rather, for the election of delegates to the convention who are known to favor it or pledged to support it. In this connection, we note that a bill has been presented to the legislature, entitled "an act to discourage candidates for the constitutional convention from concealing their views on public questions." It authorizes any candidate to designate "in not more than eight words," on his nomination paper, and on the official ballot if he is nominated, "the principles which he represents or the constitutional amendments which he favors." Apparently this project does

not meet with much approval. The Boston "Herald" (Jan. 8th) denounces it as a "puerile performance," since it would "enable statesmen who can measure their qualifications for the convention in not more than eight words to bid for popular favor by thus publicly declaring themselves committed to a particular amendment," while the Springfield "Union" (Feb. 11th) says: "To pack the convention in the interests of certain political movements or groups, and to seek to intimidate those proposed for membership into committing themselves to certain measures in advance of the convention, before they have heard questions discussed on all sides, is to be unqualifiedly condemned. This plan, if successful, would rob the convention of its deliberative character."

What may prove to be the pivotal question is whether the convention will submit its work to the people in the form of an entirely new constitution, to be accepted or rejected as a whole, or in the form of a series of specific amendments. In respect to this, its mandate is equivocal. The opinion of the Supreme Court may be asked on this point also. Those whose interest is centered in carrying some particular reform or introducing some new feature are hoping that separate amendments will be presented to the voters. Their reasons are made obvious by the following quotation from a circular issued by the advocates of a certain proposal: "We need only a majority of the constitutional convention to get our amendment before the people, while it takes two-thirds of the House of Representatives and a majority of the Sen-

ate in two successive years to do the same thing. Victory is now almost in our hands." An apprehension which is shaping itself in many minds is also disclosed in the same circular. "Any candidate for the convention," it says, "who wants the revised constitution submitted as a whole to the people really seeks its defeat and the defeat of our amendment. The candidate who advocates submission of separate amendments to the people is probably our friend." Indeed, it is not at all improbable that if the constitution is sent to the electorate as an indivisible whole, it may be rejected, and the entire work of the convention brought to naught, especially if it should be found to include any considerable number of the "fads" of which the newspapers speak. For while the opponents of any particular fad may not constitute a majority of the voters, they will be joined at the polls by those arrayed against various other fads, and thus, by a combination of minorities, the rejection of the constitution may result. There is reason to think that such causes were operative in bringing about the overwhelming defeat of the new constitution recently proposed for the state of New York.

Whatever the Massachusetts convention may or may not do, it is to be hoped that it will leave unimpaired the historic Bill of Rights. All friends of constitutional government, as it has been hitherto understood in our country, would regret the elimination or substantial change of that historic declaration, or of Adams' affirmation that it was ordained "to the end that this may be a government of laws and not of men."

The Fourteenth Amendment and the Blue-Sky Laws

The recent decisions of the Supreme Court of the United States sustaining the validity of the "Blue-Sky" laws of Ohio, Michigan, and South Dakota ought to reassure those who have feared that the rigid limitations of the federal Constitution would unduly obstruct the welfare work of the states. And incidentally they should put to confusion those ill-informed persons who have formed a distorted vision of the justices of the Supreme Court as a select coterie of censorious elders, vehemently opposed to progress, and eagerly seeking a chance to thwart the will of the people.

The statutes in question are designed to protect the people of the state from fraud, by excluding from sale and circulation within the state the stocks and bonds of wildcat mining enterprises, visionary oil companies, and other "get-rich-quick" concerns. Taking the law of Ohio as typical, it prohibits persons from dealing in stocks, bonds, debentures, or other corporate securities, except on condition of first obtaining a license from the state superintendent of banks and banking, acting as a commissioner for that purpose. That officer, before granting a license, must be satisfied of the good repute in business of the applicant and his selling agents, and he is empowered to revoke the license, or to refuse to renew it, upon ascertaining that the licensee "is of bad business repute, has violated any provision of the act, or is about to engage, under favor of such license, in illegiti-

mate business or fraudulent transactions."

Among the constitutional objections to this statute, it was strongly urged that these provisions vest such arbitrary power in the commissioner that they enable him to deprive persons of their property and, in some sense, of their liberty, at his mere whim or caprice, that it was never intended that unlimited control over the legitimate activities of the individual should be confided to an executive officer, and that, for these reasons, the statute was contrary to the provision of the Fourteenth Amendment which forbids the states to deprive persons of their "life, liberty, or property without due process of law." For the "liberty" here intended, as stated in the *Allgeyer Case*, embraces "the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and to work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Perhaps the case for the complainants was most strongly stated by the Circuit Court of Appeals, which adjudged the law unconstitutional, and which was reversed by the Supreme Court in the decisions to which we are now referring. It pointed out that "every investigation and examination

authorized is *ex parte*. The applicant is not permitted to be heard as to the granting or revocation of a license, on the important questions of his own good repute, his alleged or surmised violations of the provisions of the statute, the legitimacy of his business, the honesty of his conduct, the fairness of the terms under which his disposals are made, or his own solvency. No rules of procedure are prescribed in accordance with which the investigation or examination shall be made, nor is the commissioner required to establish any rule or regulation as to what shall constitute good repute, solvency, or fraudulent conduct. He may at will deal with each case as it arises, and vary his course to suit his pleasure. He is at liberty to hear, if he chooses, only evidence unfavorable to the investigated party. None of it need be safeguarded by an oath. The uncontrolled discretion, and even the whim and caprice (if he gives them play), of the commissioner may not only halt, but injure and perhaps destroy, a worthy business enterprise, and cast a cloud on the name of the applicant or licensee, and when such an applicant or licensee seeks redress in the courts, he must assume the burden of disproving the findings made against him, however groundless they may be."

But the Supreme Court was not greatly impressed by this argument. Conceding that it may be in the power of the commissioner to act oppressively in particular cases, no intention to do so must be imputed to him in advance. And if he should transcend the fair and just limits of his discretion, the courts are open and will give relief. "The dis-

cretion of the commissioner is qualified by his duty, and besides, as we have seen, the statute gives judicial review of his action. Pending such review, we must accord to the commissioner a proper sense of duty and the presumption that the functions intrusted to him will be executed in the public interest, not wantonly or arbitrarily to deny a license or to take one away from a reputable dealer." The conclusion is, therefore, that the "liberty" of the Constitution is not entirely unrestricted. It may be curtailed by the State in the exercise of the police power, in so far as may be necessary to prevent fraud, preserve the public morals, or otherwise promote what is clearly the general welfare. And so, if a person falls under the animadversion of the Ohio statute, and is refused a license or forfeits his license, it is true that his liberty of action is abridged, but since he may have recourse to the courts, and will presumably get whatever justice is his due, it is not true that his liberty is unconstitutionally abridged or taken from him "without due process of law."

As further evidence of the real attitude of the Supreme Court towards progressive legislation, it may be mentioned that it took occasion, in these decisions, to reaffirm its oft repeated rule that it cannot and will not enter into any consideration of the policy, wisdom, justice, or expedience of any piece of legislation brought before it. In the language of Mr. Justice McKenna: "The state has determined that the business of dealing in securities shall have administrative supervision, and twenty-six states have expressed

like judgments. Much may be said against these judgments, as much has been said, and decisions of the courts have been cited against them. We are not insensible to the strength of both, but we cannot stay the hands of government upon a consideration of the impolicy of its legislation. Every new regulation of business or conduct meets challenge, and of course must sustain itself against challenge and the limitations that the Constitution imposes. But it is to be borne in mind that the policy of a state and its expression in laws must vary with circumstances.

And this capacity for growth and adaptation is the peculiar boast and excellence of the common law. It may be that constitutional law must have a more fixed quality than customary law, or that it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative actions. This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments to the organic law."

Important Articles in Current Magazines

"Liberty and Democracy"

The *International Journal of Ethics* for January contains a very frank and very stimulating paper on "Liberty and Democracy" by Professor Hartley B. Alexander of the University of Nebraska. The gorgeous humanitarian optimism of the nineteenth century has broken down in the cataclysm of war, and "no death in history is quite so stupendously bitter." In the face of this body of death, "our democracy, if it is not to vanish utterly, must restate and revivify the articles of its faith, in a form suiting the change which has come over the life of mankind, and in a spirit which shall be different from the old, both in the greater humility and the greater courage which it will require. For such a task only the philosophic mood of quiet and resolute reflection is competent. To such a task the philosophic mind of America will

surely rise, inspired by the yet unconquered idealism through which this continent was peopled." But the road does not lead backward to the unregulated democracy of the Greek city-state. No true liberty for the individual is to be found in such an organization. For among its special forms of tyranny not the least rancorous is the tyranny of a blind, uncomprehending, but crushing public opinion. Equally unthinkable is it that we should surrender our liberties and our institutions to the Hegelian conception of the incarnate state. "In such a system as this, where the reason of every citizen is subordinate to the reason of the state, where is liberty to be found? Hegel's answer, and the answer of Germany, which has been drawn from Hegel, is simple. Liberty is never private; liberty is always public and collective. There is no freedom for the will of the individual save in its concord with the will

of the state. Without necessarily admitting the inevitable "decline of this conception from that of a state mind whose rule is the rule of appetite and force," it is obvious that the German idea of the state is diametrically opposed to the conception of the state held by Americans, and that the German notion of liberty, flowing from the German notion of the state, is to the Latin and the Anglo-Saxon no liberty at all.

"How then," asks Professor Alexander, "shall we save our state and its ideals? Is a truly democratic liberty possible? Organization for material interests is essential to human society; yet organization of ideal interests is ruinous. Can we maintain the one and avoid the other?" The just mean, he conceives, is to be found only in the way of a clearer conception of law and justice,—that longed-for ideal of healthy freedom and real justice, which desires that force shall be used no longer to create law, but that law shall regulate the use of force. But above all we need a prophet, a Socrates, to sting the lethargic souls of men. For "in the United States to-day I seem to see a petty efficiency prized over liberty, party loyalty over justice, subservience to mob expression over the exercise of individual reason. These, I believe, are symptoms of a deep and biting disease. And for its cure I can conceive no other agency than the personal inspiration of personal thought." The professor might have added that the philosophy of Socrates did not remain in the clouds. He meant it to issue in action. He taught his disciples to see the truth, but it was in order that the

truth might make them free. And freedom is not an intellectual state; it is a possession to be guarded vigilantly and fought for valiantly. And the reconciliation of liberty and democracy will fully come to pass not merely when men think in terms of law and justice, but when they act the part of good citizens.

"A Defense of the Constitution"

To restate the philosophy on which the Constitution of the United States was founded is the object of David Jayne Hill's timely and illuminating article, "A Defense of the Constitution," in the March number of the *North American Review*. To realize how opportune is a return to such a study of basic principles, we have only to remind ourselves of the tide of criticism and hostility to the Constitution now unhappily prevalent, of the hundred proposals to amend it, some of them quite revolutionary, of the disposition to forsake the safe and tried highway and wander into the field of rash experimentation in government, and of the ill-concealed purpose of those who wish to dismember the Constitution to use their new freedom for some form of spoliation, to destroy some form of personal liberty, or to force upon protesting states or individuals some surrender of their constitutional rights. Besides it is unfortunately the fact that the people in the mass have no comprehension of what the Constitution really means for the common man. The enormous majority of Americans are neither plutocrats nor proletarians. They are just the plain

people, the substantial citizens. Do they realize how intimately the Constitution is concerned in the preservation of all that is dear to them—their pride of freedom, their little possessions, their opportunities for advancement, their pursuit of happiness?

The establishment of our Constitution was in fact, as Dr. Hill points out, "the first attempt in history to lay the foundations of government in the deep setting of human rights." It gave to government a human foundation instead of a merely dynamic foundation. For the unique contribution of the American Constitution to political philosophy was the conception of liberty as a strictly personal prerogative, as distinguished from something appertaining to the citizenry in the aggregate, or the concession of a monarch to the demands of his subjects. From this premise it must follow that the prime concern of our system of government is not the state, but the citizen. The collective purpose of the people is to be accomplished through the state as their instrument. But there is no room in our philosophy for the conception of a state endowed with a will and a soul of its own, commanding the subservience of its constituent members and rightfully entitled to exploit their lives and industry for its own purposes. On the contrary, with us, liberty is not a gift from above, but the necessary precondition of self-realization. In this view, the purpose of government is "not to repress but to elicit the powers of the individual by creating the conditions for their peaceful and profitable activity. In effect, government, in this conception of it,

can be nothing else than the legal organization of liberty." The real problem of the founders was to reconcile government with liberty. But they were utterly unable to admit that there could exist anywhere in human society an unlimited and absolute authority. The reconciliation was to be effected by the enactment of just and equal laws, but also by the exclusion of any possibility of tyranny or oppression.

It is very significant in this connection, as Dr. Hill reminds us, that the very name of "sovereignty" was hateful and revolting to the men of the American Revolution, because of its implication of arbitrary power on the one hand and of obedience on the other. A "sovereign" has "subjects." But they were not the subjects of anybody, not of King George, not of each other, and not, if they could help it, of the state they intended to found. The word "sovereignty" does not appear in the Declaration of Independence. It is found in the Articles of Confederation ("each state retains its sovereignty, freedom, and independence"), but the meaning here is that no central power claiming sovereign authority in the absolute sense could be allowed to imperil local liberty. And the Constitution was "ordained and established" by "the People." We often speak of "the sovereignty of the people." This is correct. Under our system of government the collegiate sovereignty in the state and nation resides in the people. But popular sovereignty under written constitutions does not connote unrestricted power. It is not in any way inconsistent with the restraints imposed by the constitutions. It is some-

thing altogether different from a right of revolution. In effect, both the justification for the term and the ultimate attribute of the thing it means are found in the rightful power of the people, proceeding in the forms of law, to alter and amend their constitutions when and as they will. Our sovereign has no subjects. But above the impulses of men stands the majesty of law. And if we would preserve our liberty, we need never be ashamed to avow, in the noble words of Cicero, that "we are all the servants of the law in order that we may be free."

"Tinkering the Constitution"

Although Mr. L. White Busbey's very valuable paper, "Tinkering the Constitution," was published more than a year ago (*The Unpopular Review*, January, 1916), the subject of which it treats is of perennial rather than passing interest, and it may be heartily commended to the attention of those who care to inform themselves as to the multitudinous proposals for the amendment of the once-venerated instrument, the Constitution of the United States. Many people will be surprised, a few startled, to learn that more than 2,500 resolutions to amend the Constitution have been introduced in Congress since the date of its adoption. It is not at all easy to put through a constitutional amendment. But the facts of history should go far to convince us that this is not a deplorable condition, but a saving one. For had it been otherwise, or had it been possible to secure the adoption of even a considerable part of the 2,500 resolutions, the Constitu-

tion, as Mr. Busbey says, "would long ago have become a medley of contradictions and a patchwork as curious as that produced at the old-fashioned quilting-bee, when our grandmothers gathered around the frame, each with an assortment of brilliantly colored and oddly shaped patches to piece into the crazy quilt for exhibition at the county fair." Space does not permit us to follow Mr. Busbey through his instructive review of the character of these proposed amendments, further than to say that very few appear to have been supported by any weighty considerations, while many have been entirely trivial and not a few actually ludicrous. It is amusing to note how many people think first of amending the Constitution as the natural remedy for any condition of public affairs which does not wholly suit them, and what floods of proposed amendments have reflected nothing more than a temporary irritation, spite against an unpopular official, hostility to a religious body or a creed, disappointment over an election, dissent from the decision of a court, or perhaps the crest of a fast-subsiding wave of popular reform,—in short, an impulse so ephemeral that, had the proposed amendment been adopted, the very reason for its existence would have been forgotten in a few years. There is much truth in the remark attributed to Daniel Webster that the Constitution has been "a collection of topics for everlasting controversy, heads of debate for a disputatious people."

Another circumstance of interest is that many of the most recent demands for changes in the fundamental law

turn out to be nothing more than echoes from an agitated but long-buried past. The "recall of judges" is a topic much in the public mind to-day, but it was proposed more than a hundred years ago, when John Randolph advocated an amendment for the removal of federal judges on the joint address of both houses of Congress, as to which, however, it should be said that this method of removal has always been understood in England (where it has occasionally been practised) to imply a full defense and hearing, something not essentially different from the proceedings on an impeachment. So, in 1869, a representative from Ohio proposed an amendment to the effect that United States judges should not be eligible to any office under the national government, declaring that one-third of the members of the Supreme Court were crazed with the glitter of the presidency, and that he wanted to remove the germ of that insanity. It cannot have been forgotten that a very similar amendment was offered in 1916. To limit the President to a single term of office is a proposition attracting much contemporary notice; but that likewise is something like a hundred years old.

How many of us were aware that an amendment proposed in 1810 was still undecided and before the state legislatures for their consideration? In the year mentioned a proposal was brought forward for elaborating and making more stringent the prohibition against accepting gifts, emoluments, or titles from foreign powers without the consent of Congress. Mr. Busbey tells us that "this amendment was adopted by Congress, submitted to the states,

ratified by twelve of them, and under the impression that the necessary three-fourths had ratified, it was printed as a part of the Constitution, and remained there until 1817, when, in answer to an inquiry from Congress, the State Department reported that no record could be found of any action by the state of Virginia. It was concluded that the amendment had failed and it was dropped from the official copy of the Constitution. There is a contention, which is supported by precedent, that when a state has once approved a constitutional amendment, that approval can never be withdrawn. On this contention, that amendment submitted to the states more than a hundred years ago is still alive and pending, with twelve votes in its favor."

Lest it be thought that tinkering the Constitution has become an old-fashioned sport, like bear-baiting, it is well to emphasize the fact brought out by the article under review, that more than 1,000 proposals for amendments have been offered in Congress within the last fifty years. It is also significant that a large part of them are designed to effect the moral regeneration of the people by force of the fundamental law. The authors of the Constitution, including its early amendments, were concerned with writing into it prohibitions against the government. Present-day tinkers seek to write into the Constitution prohibitions against the citizen. No doubt there is ripe political ability among the men of our generation. But those who are impatient to remodel the organic law of the Republic might profitably pause a moment

to consider the example set by that wise and canny old patriot, Benjamin Franklin, when he avowed, at the close of the constitutional convention of 1787, that there were some things in the Constitution of which he did not wholly approve, but he was not certain

that he should never be brought to approve of them, and that he was willing to doubt a little his own infallibility, and would sign the instrument because he did not believe that another convention could produce a better.

Book Reviews

THE DOCTRINE OF JUDICIAL REVIEW, ITS LEGAL AND HISTORICAL BASIS, AND OTHER ESSAYS. By Edward S. Corwin. Princeton University Press, 1914.

To the mind of an old-fashioned lawyer, Professor Corwin's justification of the judicial review of legislative acts with reference to their constitutional validity is somewhat tenuous. His opinion is that "the power rests upon certain general principles thought by its framers to have been embodied in the Constitution." He finds no warrant for it in the text of the Constitution itself. He considers the decision in the case of *Marbury* against Madison to be erroneous and unconvincing, and moreover he believes that it proceeded, in part at least, from an unholy desire on the part of John Marshall to rap the knuckles of James Madison. At the same time he is perfectly correct in stating that "the question is not, what did the framers of the Constitution hope or desire with reference to judicial review, but what did they do with reference to it." It is surprising that he should have come so close to the answer without clearly perceiving it. For he discusses the provision of the

second section of the third article of the Constitution, "the judicial power shall extend to all cases at law and in equity arising under this Constitution," etc., and rightly concludes that it contains no grant of power to measure the validity of acts of Congress by their conformity with the Constitution, but is a mere definition of jurisdiction, and yet the first section of the same article almost escapes his notice. But it is precisely in the words of this section that the authority is granted,—"*the judicial power* of the United States shall be vested in one supreme court," etc. What is judicial power? It is the power to hear and decide controversies properly brought by interested parties in the courts of justice, in accordance with the existing law. So to decide, the court must determine what the law is. It may be that there is no question about the applicable statute, but that its meaning is obscure or its language ambiguous. Then the court must construe or interpret it, as a step in the ascertainment of the rights of the parties. It may be that two statutes are produced, relating to the same subject-matter, the later of which may or may not have repealed the earlier. To decide this question is then a necessary

part of the court's duty. In precisely the same way a statute and the Constitution may be brought forward side by side, and an inconsistency between them alleged. In this event it is certainly within the "judicial power" to determine whether the statute is valid or not.

This view of the matter also disposes of the notion that the act of a legislative body in enacting a statute is or should be a conclusive affirmation of its constitutionality. This idea accords with the theory of the Roman law, by which the legislator is both the maker and the interpreter of law, and the judge has nothing to do but to take what law he can find and try to fit it to the case before him. But it is not in harmony with American juristic theories. In fact, as one of our courts has said, "that which distinguishes a judicial from a legislative act is that the one is the determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions." Furthermore, the legislature makes only a general application of the statute to the class of persons (as yet unascertained) who may in the future come within its terms. The test of the validity of the law must come when it is sought to make a specific application of it to the rights or interests of some one individual. This application may be made, and often is made, in the first instance, by an administrative officer. But his decision is not final. One of the reasons why the courts are established is that the decision of

the administrative officer may not be final. It is therefore only in the courts that an authoritative reply to the question can be given.

And it is upon this ground that Professor Corwin ultimately rests his case. For his conclusion is that "judicial review rests upon the following propositions and can rest upon no others: (1) That the Constitution binds the organs of government; (2) that it is law in the sense of being known to and enforceable by the courts; (3) that the function of interpreting the standing law appertains to the courts alone, so that their interpretations of the Constitution as part and parcel of such standing law are, in all cases coming within judicial cognizance, alone authoritative, while those of the other departments are mere expressions of opinion."

The remaining essays which make up the volume are not without considerable interest and value. One deals with the decision in the case of *Dred Scott*, which the author denounces as "a gross abuse of trust by the body which rendered it." Another treats historically of the subjects of nullification and secession. Another is concerned with the explosion of what the author calls the "Pelatiah Webster myth," a theory, namely, put forward by Mr. Hannis Taylor, the historian, that the person so named, and whom Madison once described as "an able citizen of Philadelphia," and then on reconsideration struck out the adjective, was the real inventor of practically all the distinctive characteristics of the Constitution of the United States, his pamphlet suggesting a form of government having

been published four years before the assembling of the constitutional convention. The concluding paper is entitled "Some Possibilities in the Way of Treaty-Making," and contains an argument upon the authority of the national government, if it chose to exercise it, to join with other powers in the internationalization of plans for the improvement of the condition of the laboring classes, such as laws restricting the labor of women and children, minimizing occupational diseases, insuring workmen against industrial accidents, and the like.

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THE SUPREME COURT AND THE CONSTITUTION. By Charles A. Beard, Associate Professor of Politics in Columbia University. New York: The Macmillan Company, 1916. \$1.00.

The question which Professor Beard propounds for solution in this volume is this: "Did the framers of the Federal Constitution intend that the Supreme Court should pass upon the constitutionality of acts of Congress?" A very emphatic negative has lately been pronounced by a few writers of respectable authority and of more or less eminence in the legal world; and this "has put the sanction of some guild members on the popular notion that the nullification of statutes by the federal judiciary is warranted neither by the letter nor by the spirit of the supreme law of the land, and is therefore rank usurpation." One of the chief opponents of judicial review is the chief justice of a southern state, and it was the decision in the income-tax cases, rendered by a divided

court in 1894, which seems principally to have aroused his ire. He inquires: "Of what avail shall it be if Congress shall conform to the popular demand and enact a rate-regulation bill, and the President shall approve it, if five lawyers, holding office for life and not elected by the people, shall see fit to destroy it, as they did the income-tax law? Is such a government a reasonable one, and can it be longer tolerated after 120 years of experience have demonstrated the capacity of the people for self-government? If five lawyers can negative the will of 100,000,000 of men, then the art of government is reduced to the selection of those five lawyers." One further quotation from this writer may be permissible, for the purpose of showing how utterly he misconceives the spirit in which conscientious judges approach the consideration of questions of constitutionality, and the severe rules by which they limit their inquiry. "Such methods of controlling the policies of a government," says the chief justice, "are no whit more tolerable than the conduct of the augurs of old, who gave the permission for peace or war, for battle or other public movements, by declaring from the flight of birds, the inspection of the entrails of fowls, or other equally wise devices, that the omens were lucky or unlucky, the rules of such divination being in their own breasts, and hence their decisions beyond remedy."

Now this question is not one of political expedience; it is a question of law. The point to be determined is not whether we wish or desire, or think it an element of good government, that

our judges should exercise this authority. The question is whether or not they rightfully possess it. And this must be decided upon a consideration of the text of the Constitution, a view of its spirit and purpose, and an historical study of the evidence as to the meaning and intention of those who framed it. It is to the latter branch of the argument that Professor Beard chiefly addresses himself. As he says, "while the desirability of judicial control over legislation may be considered by practical men entirely apart from its historical origins, the attitude of those who drafted the Constitution surely cannot be regarded as a matter solely of antiquarian interest. Indeed, the eagerness with which the views of the Fathers have been marshalled in support of the attack upon judicial control proves that they continue to exercise some moral weight, even if they are not binding upon the public conscience."

Proceeding, therefore, to a close study of the men who composed the constitutional convention of 1787 and of their recorded utterances, our author shows conclusively and beyond peradventure, that there was a group of about twenty-five delegates whose character, force, and ability, as well as their constant attendance and diligence in the work of the convention made them the dominant element in its councils. Seventeen of these expressed themselves as in favor of the authority of the judges to pronounce upon the constitutional validity of acts of Congress, or at least showed, by their remarks in debate, that they assumed the existence of such an authority as a matter of course. The other members

of the dominant group are not shown to have voiced any opinion on the question. The three members of the convention who distinctly avowed an opposite opinion were among those who exercised no special influence, contributed no constructive ideas, and assumed no position of leadership. In view of this, it is difficult to withhold assent from his conclusion that "it cannot be assumed that the convention was unaware that the judicial power might be held to embrace a very considerable control over legislation, and that there was a high degree of probability (to say the least) that such control would be exercised in the ordinary course of events."

Nor can it be contended that the ratification of the Constitution was effected in the several state conventions under any misapprehension as to the scope of the judicial power and the occasions for its exercise which might arise. The convention in Virginia was enlightened on this specific point by no less a person than John Marshall himself. The Maryland convention had before it a letter of Luther Martin which could leave no doubts as to his opinion on the subject. If the members of the Pennsylvania convention had any doubts regarding the probable exercise of judicial control over legislation under the new Constitution, these must have been removed by the speeches of James Wilson in defense of the judiciary. It seems hardly likely that the New York convention could have been ignorant of Hamilton's views as expressed in the "Federalist." And it was the task of Oliver Ellsworth to make the matter perfectly plain, as he

did, to the convention in Connecticut.

So far, therefore, the evidence of history appears to be entirely incontrovertible. As to considerations drawn from the spirit, the purpose, and the general character of the Constitution, it is not possible here to follow Professor Beard into all the details of his interesting and instructive argument. But it is doubtless true, as he says, that the members of the constitutional convention "were not seeking to realize any fine notions about democracy and equality, but were striving with all the resources of political wisdom at their command to set up a system of government that would be stable and efficient, safeguarded on one hand against the possibilities of despotism and on the other against the onslaught of majorities." And it seems that few should hesitate to accede to his conclusion that the thoughtful and representative men of that day "must have rejoiced in the knowledge that an independent judiciary was to guard the personal and property rights of minorities against all legislatures, state and national."

In this view, therefore, if it be true that Chief Justice Clark's hundred millions of men are bent upon acts of spoliation and of shredding the Constitution to bits, it is not deplorable—on the contrary, it is profoundly well,—that five, or nine, or any number of upright judges should be found to thwart their unrighteous will. If the people are not satisfied with their Constitution they can amend it. But no good end of government can be promoted by accomplishing an act of ravishment upon the fundamental law.

THE RECORDS OF THE FEDERAL CONVENTION OF 1787. Edited by Max Farrand, Professor of History in Yale University. Three volumes. Vol. I, pp. xxv, 606. Vol. II, pp. 667. Vol. III, pp. 685. New Haven: Yale University Press, 1911.

In compiling these three sumptuous volumes, Professor Farrand has admirably acquitted himself of a most laborious task, and has rendered a service to all students of the American constitutional system and to all future historians which deserves and will certainly receive their grateful appreciation. For he has here assembled all the available "source" material upon the constitutional convention of 1787, hitherto scattered through various printed volumes and some of it never before published, in what we must believe to be the final and definitive work on the subject, since it is highly improbable that any further combing of the original materials would yield items of any importance, and since it would hardly be possible to improve on Professor Farrand's use and arrangement of his documents. The "Debates" or "Journal" kept by the industrious and painstaking Madison, together with the official record of the secretary, William Jackson, must still remain our chief source of information as to the discussions and resolutions of the convention. But the volumes before us also include much that is valuable from the notes kept by Yates, King, McHenry, Patterson, Hamilton, and other delegates, not omitting the sprightly and amusing comments of William Pierce of Georgia upon the personal and political

characteristics of his fellow delegates, and some important documents disclosing the work of the Committee of Detail in different stages of its progress. The author has very wisely chosen not to set forth these various diaries or records successively, one after the other, as that would have left the reader's task in comparing them almost as troublesome as before, but he has adopted the plan of gathering together all of the material from all of the records bearing upon each day's session of the convention, and of allowing each record for that day to remain complete by itself.

An important part of the author's task (indeed he states it to have been his "first purpose") was to bring back the texts from a state of corruption, through successive revisions and emendations, to the state of their original purity, by an exact reprint of the original manuscripts. It is evident that he has performed this undertaking with all of the historian's care for unimpeachable accuracy,—one had almost said with meticulous particularity, since he offers something like an apology for the failure to use superior letters in the abbreviations. That such care and precision in the editing of the materials was badly needed, in the interests of historical correctness, is apparent from his statement that "it has been found that most printed texts of the more important records cannot be accepted implicitly, because of the liberties that have been taken with the manuscripts in preparing them for publication. Furthermore, in the case of the most important record of all, Madison's Debates, it is easily proved that, over

thirty years after the convention, the author revised the manuscript and made many changes upon insufficient data, which seriously impaired the value of his notes. This is also true of other records."

The third volume contains supplementary matter, the importance of which could hardly be exaggerated, and which is necessary to any exhaustive study of the subject. It consists of a mass of documents (408 in number), chiefly extracts from the correspondence of the delegates to the convention and of a few other well-informed persons, contributions to the press, public addresses, and opinions expressed in the state legislatures and ratifying conventions, and, later, in the debates of Congress, in which those best qualified to know the facts explained the action or the intention of the constitutional convention in respect to particular subjects. It would be difficult to pick and choose among this rich repository of information, but it may be mentioned that it includes a great number of letters passing between the members of the convention, or written by them to the leading and influential men in their states, much of the defense of the Constitution by Madison and Hamilton in "The Federalist," the important parts of the proceedings and speeches in the state conventions, the whole of Luther Martin's "Genuine Information" communicated to the legislature of Maryland, and three very interesting letters or reports by the French *chargé d'affaires* to his Minister for Foreign Affairs, which show how anxiously the proceedings of the convention were watched abroad.

The whole of the material is made easily accessible by two well-prepared indices, the first arranged according to the clauses of the Constitution, the second a general index to the three volumes. And no small measure of praise should be accorded to the Yale University Press for the mechanical execution of the work, which is excellent in every particular.

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THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES. By Max Farrand, Professor of History in Yale University. New Haven: Yale University Press, 1913. Pp. 281.

Drawing on the rich store of materials in his "Records of the Federal Convention," Professor Farrand here presents the story of the making of the Constitution in narrative form. We think he does himself less than justice in describing it as "a brief presentation of the author's personal interpretation of what took place in the federal convention, merely a sketch in outline, the details of which each student must fill out according to his own needs." It is of course not the final word on the subject. It may be that the definitive history of the convention of 1787 will never be written. None the less, this volume is a valuable contribution to American historical literature. It is comprehensive without being diffuse, it contains all that is essential for the general reader, it is accurate in all details and free from any bias, and it is embellished by a clear, pleasant, and graphic style. It is, moreover, of absorbing interest, not only as a recital of momentous events, but from the

manner in which the personal characteristics and the political opinions of the members of the convention are exhibited. Here we have a "close up" view of the fathers of the Republic, as they labored through the long weeks of an unusually hot summer, not at all harmonious in their thoughts upon the formation of the new government, not free from spirited and even acrimonious debate, but all earnestly bent upon the accomplishment of their tremendous task, and finally uniting in the composition of the most important of all political instruments. Here we see the august Washington, carefully abstaining from participation in the debates, even when the convention sat in committee of the whole, lest his immense influence should overawe the other delegates, yet unable wholly to suppress his smiles or frowns as he favored or disapproved the proposals brought forward. Here also we have pictures of the venerable and philosophic Franklin, casting counsels of moderation upon the stormy waters of debate; of Madison, the methodical, learned, and industrious, the scholar in politics, yet more than anyone else the father of the Constitution; of the small and tense frame of Hamilton, the aristocrat, as he delivered his one great speech in the convention; of Luther Martin, able and (as some thought) unscrupulous, inconceivably tedious and prolix, and yet the author of the "supreme law of the land" clause; of the brilliant and slightly presumptuous youth from South Carolina, Charles Pinckney; of William Pierce of Georgia, that most excellent "mixer," blessed with a sense of humor, who placed posterity under an

obligation by recording in familiar phrases his personal impressions of all his fellow delegates; and of those gifted men and solid citizens Mason, King, Ellsworth, Sherman, Gerry, Wilson, Randolph and the two Morris.

In these days, perhaps more than at any other time, it is important that American citizens should acquaint themselves with their Constitution. This cannot be done by a mere perusal of its text. A knowledge of its spirit, its great purposes, its historical bases, can be gathered only from a study of why and how it came to be made. To all who value the institutions of our country and desire an intelligent appreciation of their worth and the reasons for their existence Professor Farland's excellent work is highly commended.

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WOMAN'S SUFFRAGE BY CONSTITUTIONAL AMENDMENT. By Henry St. George Tucker. New Haven: Yale University Press. London: Humphrey Milford; Oxford University Press, 1916, pp. 204.

The author of this work carefully avoids a discussion of the question of the right of women to vote and refrains from expressing any opinion whatever on the subject, but assumes as his task that of showing that the attempt to bring about the right of suffrage for women by an amendment to the Constitution of the United States is opposed to the genius of that instrument, and subversive of one of the most important principles incorporated in it.

His line of argument is that the Constitution itself (citing Article I, Section 2; Article II, Section 2; and the

Fifteenth and Seventeenth Amendments;) leaves the matter of the qualifications of the voters and the regulation of suffrage entirely and exclusively to the individual States to determine.

Certain States, however, have found it expedient to grant the right or privilege of suffrage to women. Other States, believing it inexpedient for them to adopt the system, have denied the right to women for reasons which concern the people of those States only. Is there, then, warrant or justification, or is it consonant with the genius and spirit of our system of Government, our ideas of freedom of action and of local self-government, for a group of States to force upon another group a system of suffrage not believed by the latter to be adapted to their social, ethnic, and political needs and conditions? It cannot be denied that there *are* varying conditions of suffrage in the different States and that these have a profound influence upon the attitude of mind of the people toward the question of suffrage. The people of the United States having agreed in their Fundamental Law to leave to the individual States this important feature of local self-government, and local self-government being one of the greatest bulwarks of a free people, why should it be abridged by the action of even the constitutional three-fourths of the States, when no advantage results to the majority States, and the minority are forced to accept that which is contrary to their best interests, as they believe? Such a course does not work for "the promotion of the general welfare" called for by the Constitution, but tends to destroy the equilibrium of power existing between the States and the Federal Government, established by the Constitution.

The principle of State control of suffrage has been recognized and maintained for one hundred and twenty-three years, and the people very recently made recognition of it anew in the seventeenth amendment. But if the proposed amendment for suffrage of women were to be adopted and the power taken from the States and given to the Federal Government, "the balancing of powers will be destroyed and an unjust inequality of power established that must result in the destruction of our present form of government."

The work contains a clear, logical, fresh re-statement of the meaning, and significance to the individual citizen, of the term "local self-government." These three words, he says, "are not, as supposed by many, mere words to conjure with; oftentimes invoked by politicians, because of their hoary and honorable lineage, to lead the people

into devious and slippery paths. These words had their origin in the profoundest political philosophy. They are the answer which free government makes to the oppressed. They are the response that liberty makes to tyranny. They are the guaranty of the safety of the home, the recognition of the trusteeship of man as the defender of the home, and the guardian of its sacred precincts."

Throughout the book there is a frankness and reasonableness that is refreshing. One finishes the reading of it with a regret that it is not longer, and with a purpose to re-read it, for it is stimulating to the mind, and gives one a firmer conviction of the soundness of the principles of government which our forefathers adopted as best suited to perpetuate liberty and justice.

CHAS. RAY DEAN.

Preparedness, A National Function

A bill is pending in the legislature of New York, proposing an amendment to the constitution of that state, by which the state would surrender to the federal government all of its constitutionally reserved authority to provide for the training of its militia and to appoint their officers. The bill recites that the organization, arming, and discipline of the people of the United States for military purposes, as well as the command and government of the forces in case of war or invasion, are national functions, affecting the security and prosperity of the entire country, and therefore the amendment proposed would declare that all laws, regulations, and constitutional provisions of the state relating to the militia

are subordinate to the power of the federal government.

It will be remembered that the Constitution of the United States, although it grants to Congress power to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and to "provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States," yet reserves "to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Even this limited measure of control by the national government over the

military forces of the states was not obtained without decided and even impassioned resistance in some of the state conventions called for the ratification of the Constitution; and it was then felt that the reservation of the authority to appoint the officers and train the militia was the only safeguard which protected the states against an oppressive and tyrannical employment of their armed forces, possibly against themselves, by the United States.

The change of sentiment in this regard is of course a matter of gradual evolution, and not a sudden growth. But the measure under consideration in New York marks the farthest advance in the direction of nationalizing the military strength of the country, or giving to Congress the authority to do so. Concentration of control over all the fighting potentiality of the nation may become an absolute necessity in the event of war with any important foreign power. But aside from this, if the proposed constitutional amendment should be submitted to the people of New York and adopted by them, it will be interesting as the first instance in which a state has voluntarily surrendered to the United States a power specifically reserved to it, although the people of the states generally have tacitly acquiesced in an ever widening assumption of functions and activities by the central government, in so much that some of the duties resting primarily upon the states seem now to be but imperfectly performed unless

by the aid of federal laws and federal officers, and some of the powers of the states appear to be in danger of becoming atrophied from disuse.

At the same time, New York has taken measures for the more efficient organization and mobilization of its militia forces. Chapter 568 of the Laws of 1916 provides that the militia of the state shall be divided into two parts, the active and the reserve militia, the active corps to consist of the organized and uniformed military force known as the "National Guard," and of the naval militia, and the reserve militia to consist of all those liable for service in the militia but not serving in the National Guard or in the naval militia of the state. The law also declares that "whenever it shall be necessary to call out any portion of the reserve militia for active duty in case of insurrection, invasion, tumult, riot, or breach of the peace, or imminent danger thereof, or when called forth for service under the Constitution and laws of the United States, the Governor may call for and accept as many volunteers as are required for such service, or he may direct his order to the mayor of any city or the supervisor of any town, who, upon the receipt of the same, shall forthwith proceed to draft as many of the reserve militia in his city or town, or accept as many volunteers, as are required by the Governor, and shall forthwith forward to the Governor a list of the persons so drafted or accepted as volunteers."

ANNOUNCEMENT

The next number of **The Constitutional Review**, to be issued July 1st, will contain, among its leading features, an exhaustive and critical study of the new constitution of Mexico, an account of Russia's struggle for freedom and constitutional government, with special reference to the rapid progress of the present revolution and the plans and purposes of the provisional government, an account of the proceedings in the constitutional convention of Massachusetts, a review of constitutional amendments adopted or rejected in the several states in 1916, and a study of pending and proposed constitutional revisions and amendments in the various commonwealths, besides synoptical notices of several important articles in the current magazines and reviews of certain notable new books.



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By THE NATIONAL ASSOCIATION FOR CONSTITUTIONAL GOVERNMENT

The National Association for Constitutional Government was formed for the purpose of preserving the representative institutions established by the founders of the Republic and of maintaining the guarantees embodied in the Constitution of the United States. The specific objects of the Association are :

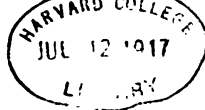
1. To oppose the tendency towards class legislation, the unnecessary extension of public functions, the costly and dangerous multiplication of public offices, the exploitation of private wealth by political agencies, and its distribution for class or sectional advantage.

2. To condemn the oppression of business enterprise,—the vitalizing energy without which national prosperity is impossible; the introduction into our legal system of ideas which past experience has tested and repudiated, the adoption of the Initiative, the Compulsory Referendum, and the Recall, in place of the constitutional system; the frequent and radical alteration of the fundamental law, especially by mere majorities; and schemes of governmental change in general subversive of our republican form of political organization.

3. To assist in the dissemination of knowledge regarding theories of government and their practical effects; in extending a comprehension of the distinctive principles upon which our political institutions are founded; and in creating a higher type of American patriotism through loyalty to those principles.

4. To study the defects in the administration of law and the means by which social justice and efficiency may be more promptly and certainly realized in harmony with the distinctive principles upon which our government is based.

5. To preserve the integrity and authority of our courts; respect for and obedience to the law, as the only security for life, liberty, and property; and above all, the permanence of the principle that this Republic is "a government of laws and not of men."



Wise and Unwise Extension of Federal Power

By William Howard Taft¹

Washington was the President of the Convention of 1787 which framed our present Constitution. The sketchy and laconic journals do not show that he took much part in the deliberations of the body, but they do show that he was very constant in his attendance, and his correspondence indicates that he followed closely the proceedings. We cannot doubt that, with his commanding influence, his well-balanced judgment, and his high patriotism, he was a power for good in securing the wonderfully wise compromises of that remarkable instrument of government, and that his title to credit in the ultimate result cannot be overestimated. This great charter from the people of the United States, organizing a national government, is in nothing more exceptional than in its preservation down to the present moment substantially as it was when it was ordained by the people one hundred and twenty-eight years ago.

The first ten amendments were practically contemporary with the Constitution itself. They comprised the Bill of Rights against abuses of the national government and two rules of construction, and were adopted in fulfillment of an informal condition of ratification exacted by the State conventions. The eleventh amendment was a mere reversal of a Supreme Court decision at variance with the construction promised in the *Federalist* as to the non-suability of states by private individ-

uals, and the twelfth amendment was a mere reframing of an awkward and clumsy method of selecting the President. The thirteenth, fourteenth, and fifteenth amendments seventy years later were the result of the war, and were adopted to protect the emancipated slaves and to readjust conditions to their freedom. For a moment, until the "Slaughter House cases," it seemed as if the balance up to that time carefully maintained in the Constitution between the local self-government of the states and the national powers of the government might be disturbed; but that decision so limited the operation of the fourteenth amendment that the danger passed. By the fourteenth amendment, the short Bill of Rights contained in the original Constitution, to secure persons within state jurisdiction from abuses of the state government, was extended to forbid state laws taking life, liberty, or property without due process of law, or depriving a person of the equal protection of the laws. Practically this has not expanded congressional or federal executive powers, but has only brought within the power and duty of the Supreme Court the enforcement of these guaranties in respect of state legislation. In the sixteenth amendment, the taxing powers of Congress are enlarged, but not beyond their actual exercise during the Civil War; and by the seventeenth amendment the mode of selecting Senators in the state, trans-

¹An address delivered at Johns Hopkins University February 22, 1917, and reprinted by permission of the author.

ferred from the legislatures to the people, has not enlarged or diminished state powers.

The plan of Washington and his associates was to create a nation to consist of a central government and state governments. The central government was to have the power over foreign relations without interference by the states, complete power over war and peace, independent power to tax and raise money, and the absolute power over commerce, foreign and national. The states retained the wide field of local government. To this balance of authority is due the permanence of our Republic. An attempt to govern from Washington the home affairs of the people in forty-eight different states by acts of Congress and executive order would have severed the union into its parts. An attempt to give the national government power to brush the doorsteps of the people of a state in parochial matters and in a local atmosphere which must be breathed in order to be understood, would have created a dissatisfaction and a fatal gnawing at the bond between the states. Confederations like ours have usually gone to destruction either through the expansion of the national authority into an arbitrary and tactless exercise of power, or through the paralyzing of needed national strength by the encroachment of the constituent states. Our Constitution has maintained its balance, and that is why we are stronger to-day than we ever were in our history.

This statement will not meet the concurrence of many who insist that the power of the national government

has vastly increased as compared with that exercised by the states. Their view is not inconsistent with mine when the facts upon which they rely are analyzed. The national government exercises a much greater volume of power that it ever did in the history of the country. But the increase is within those fields of jurisdiction which have always under our Constitution belonged to the federal government, and the increase that we see to-day over what it was in Washington's day and in Jefferson's day is due not to a change of the original plan, but to two circumstances. One is that Congress did not see fit at once to exercise all its powers and allowed them to lie dormant until long after the Civil War. No one will deny, for instance, that Congress always had power over interstate commerce, but not until 1887 did it attempt to exercise direct control by an Interstate Commerce Commission. This is only one instance of many. The second circumstance is that in the growth and settlement of the country and expansion of its industries and business and the change effected by the use of steam and electricity in transportation, by which distance has been minimized and the country has been made compact, the volume of commerce of national and international character has greatly increased in proportion to that confined within the individual states. In Washington's day the total commerce within the states was 75 per cent. of all the commerce of the country. To-day the commerce within the limits of the states is 25 per cent. only of all the commerce of the country, and the proportion is dim-

inishing. This of course affects the volume of national power in regulating the interstate and foreign commerce as compared with that exercised by the states, without in any degree changing the principle upon which the two jurisdictions are divided.

The time has not come when our Constitution should be amended to change that line of division. But the time is here when Congress, within the field of its acknowledged jurisdiction, should assert more power than it has heretofore done, and meet a condition of affairs resembling much that which really prompted the making of the Constitution itself. The chaos in the commerce of the country before our present national union, by the obstruction to its free flow between the states caused by state jealousies, state greed, and state busy-body legislation, brought about the calling of a convention at Annapolis. That convention failed for lack of attendance, but it led directly to the call of the convention, the framing of the Constitution, and its ratification. There were other causes in abundance for the Convention of 1787, but the most acute, and the one with respect to whose remedy there was practically no difference of opinion, was the necessity for the taking over of the control of interstate and foreign commerce by a central power which should exclude state interference. When the actual state of our national transportation facilities to-day is examined and analyzed, measures of relief seem as imperative as they were in 1787. Needed action may be had without any constitutional amendment or change in the structural plan of our

government. It is within the conceded power of Congress.

The inadequacy of our railroad system to meet the demands of our rapidly increasing population and the volume of transportation that our foreign trade demands, and to meet the requirements of a state of war which we face, is startling. We have had many warnings from railroad men as to what would occur under conditions like the present. Their warnings are now being vindicated. The embargoes which the railroads have been obliged to impose on legitimate shipments are a mathematical demonstration of how far short is our arterial system of interstate commerce.

In the year ending June 30, 1916, although we had the greatest business prosperity in our history, only 700 miles of new railroad line were constructed. With the exception of the first year of the Civil War, this new mileage is less than any year since 1848. Down to 1907, our new annual railroad construction averaged nearly 5,000 miles. One-sixth of our total railroad mileage is owned by bankrupt companies and is in the hands of receivers. The total capitalization of those companies amounts to \$2,250,000,000. State legislation has interfered with the railroads in securing money enough properly to maintain and improve their equipment. Nineteen states have laws regulating the issue of securities with railroads doing business in the state. This has led to the imposition of unreasonable fees for the issuing of stock and to the burdening of loans and readjustments needed in order properly to finance the roads with a view to in-

creasing their capacity. Not only that, but in many cases railroads are helpless under state legislation to secure loans at all. The evidence before Congress indicates that at least five billions of dollars should be borrowed to supply the railroads of the country with side tracks, warehouses, and terminal facilities, and other improvements needed to give capacity adequate to do the business of the country. Since January, 1916, when our prosperity has been beyond anything in our history, not a single share of new railroad stock has been listed on the New York Stock Exchange, and the common stock of not more than a dozen American railroads is being sold on the New York Stock Exchange above par. Most railroads cannot float long-time bonds, and must depend on short-time notes to raise the money for maintenance and equipment of their present capacity. There is no possible hope under present conditions that five billions can be raised to increase railroad capacity, although capital is abundant, interest rates are moderate, and good investments are sought.

The cause of this condition is to be found in over-regulation, over-restriction, unfair taxation, and a general public attitude of hostility to railroads, especially in state legislation. The reason for this is easy to find. There was a time in the history of the country when legislatures and Congress were only too eager to encourage the construction of railroads and their operation, and then there were extended them privileges and votes of direct assistance that were over-generous. The managers of railroads took advantage of this favorable attitude, forgot their

duty under the common law, and granted outrageous discriminations among shippers and as between localities. They exercised great and necessarily corrupting influences in our politics, and with other great corporate organizations they created a danger in this country of plutocracy which the people finally realized and then took radical steps to prevent. This popular fear caused the passage of the interstate commerce law, and its stiffening amendments through twenty years were forced by the flouting resistance of the railroad managements. It caused the passage of the anti-trust act and it created a great reform by driving corporate organizations out of politics. But the indignation of the people was not restrained. They are a leviathan which cannot be aroused to only a moderate remedy, and they have carried the measures of reform to an excess which now must itself be reformed. Politicians and demagogues in various states have found their way to power through continued nagging of the railroads, and, with the history of railroad abuses, they have been able to continue this campaign and profit by it personally down to the present day. The railroads drove Congress into the law of 1910, by which complete control over interstate railroads is given to that body, and even that body has probably not been as generous and as just, due to this popular feeling, as it ought to have been in the treatment of the railroads. Justice to the railroads of itself requires a change in this condition. They have sinned in the past, but they have been punished sufficiently in the loss of their

revenues and in the difficulties of their operation. Far beyond the question of justice to them and their stockholders is the question of the life of the nation and the need there is for relieving the circulation of the blood in our national body from the obstructions that are inflicting necessary evil upon our people.

The same cause that led to the creation of the Interstate Commerce Commission and the stiffening of its powers led to the creation of some forty-eight different state railroad commissions. Sometimes they were appointed and sometimes elected, but the office of Railroad Commissioner too frequently became a stepping-stone to higher political powers. Thus the local hostility against the railroads manifested itself in the harsh measures of the state commissions against the railroads.

Again, railroad commissions in some states have been tempted to make rates favorable to business points in the state and unfavorable to those of other states. It is a fight for business between the states exactly analogous to that which took place between the states before the Constitution. It greatly interferes with the symmetry of the system of rates fixed by the Interstate Commerce Commission, and the Supreme Court has spoken in no uncertain terms of the power of Congress to remedy such interference.

State laws affecting equipment and operation are another burden upon interstate railroads. Thirty-seven states have divers laws regulating locomotive bells; thirty-five have laws about whistles; thirty-two have head-light laws.

States are generally content with two-wheeled trucks on cabooses, but fifteen require four-wheeled trucks. The length and constructive weight of cabooses, too, is the subject of legislation in thirteen states. One state requires cuspidors between every two seats in a car, and another forbids them. One requires screens in the windows of passenger coaches, and another forbids them. There is just as much burden in the laws affecting operation as in those of equipment. The requirement as to extra brakemen and the full-crew laws all increase the cost of operating the railroads and injure instead of aiding efficiency. Fifteen states have laws designed to secure preferential treatment for their freight by prescribing a daily movement for freight cars. Though under the federal law there is no demurrage penalty for failure to furnish cars to a shipper, several states have penalties running from one dollar to five dollars per car per day. The result is that the railroads are compelled to discriminate against interstate commerce and against commerce in the states that have no demurrage penalties.

In ten years, while the gross receipts of the railroads have increased only 50 per cent., the number of general office clerks has increased 87 per cent., with an increase of 120 per cent. or over forty millions of dollars in the annual wages paid them. The taxes upon railroads by the states have grown apace and every device adopted to avoid the Federal Constitution and heap a burden upon these instruments of interstate commerce. In the fiscal year of 1915 the railroads were compelled

to furnish to the national and state commissions and other bodies over two millions of separate reports. If the duplicates are included, the total is swelled to three millions. The cost of state regulation to the railroads, to the shippers, and to the public generally runs into hundreds of millions of dollars a year, while the expense of maintaining the various state railroad commissions approximates fifty millions. These facts and figures I have taken from an article by Mr. Harold Kellock in the "Century Magazine" for February, and I have reason to believe that they are trustworthy, and, even if only part be true, they disclose a most serious condition.

The facts furnish some explanation of why we are having food famine and coal famine in New York and Chicago and elsewhere, when we are the richest country in the world, with the greatest productive capacity and are enjoying the greatest prosperity. Other causes doubtless co-operate to create such an anomaly, but the breakdown of our interstate transportation system is one of the most important. We have starved our railroads into a state where they live only from hand to mouth. We have frightened capital from them by our hostile and unwise measures, prompted by a just but unmeasured indignation. What is the remedy? It is to take the interstate commerce of the country entirely out of reach of the hostile blundering, greed, and jealousy of state legislatures. Can this be done? It seems to me that the path leading to such an end is clear, if Congress has the foresight and courage to take it. It will cause a great deal of local oppo-

sition by the enormous machinery that has now been created for the intra-state regulation. The state railroad commissioners and their subordinates who are now drawing substantial salaries and who are looking to such offices as a means of stepping into further political prominence will swarm about Congress to prevent such action. The state commissioners have already organized with a view to protection of their jurisdiction. But I submit that the present conditions ought to make their objections of little weight. Of course we must have a fairer treatment of railroads by the Interstate Commerce Commission and greater dispatch in giving them advanced rates where circumstances justify. The Interstate Commerce Commission has so wide a jurisdiction that it is impossible for it to dispose of all the business before it without additional force. A bill has been pending before Congress for this purpose, but it does not command the attention or the action which bills of less merit do. We may, however, count on the improvement in the machinery of the Interstate Commerce Commission, a possible division of the country into districts with subordinate tribunals to pass on the great volume of issues, and with appellate or review proceedings in the most important cases to be disposed of by the Commission itself. This is the only plan of organization that we have found possible in the administration of justice, and, as the hearings are analogous to those in court, the same system seems to be required.

But the great change which should be had is the complete taking over of

the interstate commerce business of the country into the regulation of the Interstate Commerce Commission. This should be done, first, by requiring that every railroad participating in interstate commerce should only be permitted to continue to do so upon its taking out within a certain time a federal charter of incorporation. This would cover practically all the railroads of the country, for there is no railroad which is not and must not be engaged in interstate commerce business. Since the great decision of Chief Justice Marshall in *McCullough* against Maryland, I presume that there can be no doubt of the power of Congress to pass a law for the federal incorporation of railroads engaged in interstate commerce. This is certainly an appropriate means of providing for the regulation of the flow of the lifeblood of the country.

Such federal incorporation would afford an easy means of excluding state interference except as it might be permitted by approval of the Interstate Commerce Commission. As the federal government has protected national banks against unjust taxation, so it might provide in respect to the railroads that no greater taxation should be imposed upon the property of railroads than is imposed upon the property owned by individuals or corporations in the states. The intra-state rates to be fixed by the state railroad commissions could be made completely subject to the supervision and rejection of the Interstate Commerce Commission, as essential to the symmetry of the regulation of interstate commerce. The limitations upon the power of railroads

to borrow money could all be vested in the Interstate Commerce Commission and taken altogether out of the now unwise control of state legislatures and state commissions. The substitution of one master for forty-nine, the reduction in actual expense for responding to inquisitorial and often useless demands, the assurance of reasonable protection, would restore railroad property to its proper place in the confidence of the investing public, and the funds needed for material expansion of our transportation facilities would be at once forthcoming. Nor would the action taken be the slightest departure from the structural plan of government framed at the birth of our Republic. The power of Congress on this head could not be set out more comprehensively than by Mr. Justice Hughes, in the case of *Houston, East & West Texas Railway Company* against the United States (234 U. S., 342), as follows:

"Congress is empowered to regulate, that is, to provide the law for the government of interstate commerce; to enact all appropriate legislation for its protection and advancement; to adopt measures to promote its growth and insure its safety; to foster, protect, control, and restrain. Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operation in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which in-

terstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of intra-state commerce shall not be used in such manner as to cripple, retard, or destroy it. The fact that carriers are instruments of intra-state commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the federal power from being exerted to prevent the intra-state operations of such carriers from being made a means of injury to that which has been confided to federal care. Wherever the interstate and intra-state transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field."

But unwise extensions of federal power over interstate commerce are sought, which will improperly interfere with state independence in the field of local government. It should be observed from Justice Hughes' language, just quoted, that the power of Congress to control interstate and foreign commerce is vested in it in order to promote that commerce and to prevent its use for improper or unwise purposes. It is certainly within the function of Congress to adopt all measures to make it as efficient an instru-

ment as possible, and to prevent its being made a vehicle for the carriage of merchandise or communications detrimental to the welfare of the public who are the recipients or the objects of such commerce. Thus the restriction upon the transportation of impure foods, of impure drugs, and of improper or diseased meat from one state to another is plainly within the regulatory power of Congress to prevent the use of commerce for injurious purposes. So we have the law forbidding the transportation by express companies and otherwise of lottery tickets which would make interstate commerce a vehicle for the spread of the gambling vice and bring evil to those who are to be reached by such commerce and are to be the object of its vicious purpose. But now Congress has made a radical change in the use of its control over interstate commerce, which, whether constitutional or not (and the question will soon be pending in the courts), is in its essential character an abuse of the power of Congress. It would form a precedent for indirectly transferring from the states to the central government control of the police power of the states which it has been the purpose of the Constitution to vest in the states.

I refer to the child-labor law. By this law it is made unlawful to carry in interstate commerce merchandise the result of manufacturing in which children of less than a certain age have participated. Its purpose is plainly to require the states, at the expense of losing participation in interstate commerce in many important manufactures, to enact child-labor laws of a cer-

tain kind. This bill finds its support in two motives. During the last two decades we have seen the growth of a most worthy and commendable interest in measures for uplifting the lowly and oppressed and protecting them against their weaknesses and the cupidity of employers and capital. It has shown itself in safety-appliance acts, in tenement-house acts, in health laws, in factory acts, in workmen's compensation acts, in hours of labor acts, and in child-labor acts in various states. I would be the last one to place any obstruction in the progress of such work in general or of the protection of children in particular. It is a paternalism in government, most of which is wise. That it should have excesses which have not helped the cause is to be expected in a movement of this kind, and we may hope that such excesses will be moderated as experience demonstrates their futility. The zeal of many generates impatience on their part at the slowness of some states to adopt measures that they deem necessary. They also grow restless under the lack of effective enforcement of the laws which they find in state governments. Appreciating the effectiveness of the national government, with a single executive, removed from the obstructing influence of local politics, they struggle to secure the aid of the federal arm in remedying the wrongs their eyes are focussed on. They feel themselves charged with no responsibility in the maintenance of the balance of powers between the state and the federal government. The disturbance of that balance has not the slightest weight to restrain their effort to secure the abate-

ment of the evil against which their whole energies are directed.

The second motive for the child-labor bill is selfish and affects those whose business is conducted in states where such a child-labor law is rigorously enforced, and who believe their power of competition is injuriously affected by the absence of a child-labor law or its lax administration in states of their competitors. Nor are they restrained in their advocacy of such a measure by any concern over the disturbance of the constitutional balance of power between the states and the federal government.

To students of history and to those who take a broad, impartial, statesman-like view, the use by Congress of the power of interstate commerce as a club to control the states, in the character of the police measures that they shall adopt in their own internal affairs, is a departure from its previous course that may well give great concern. If, by the interdiction of goods made by children under a certain age, Congress can compel states to enact laws such as Congress desires on the subject of child labor, it may extend its control in unlimited directions, and the state governments will merely become the satellites of Congress and lose the independence in their control of home matters that has heretofore given the popular and solid strength to our political existence. It may be that the Supreme Court will hold that it may not look into the motive of Congress in enacting such legislation, and that, because it is regulatory of interstate commerce, it is within congressional discretion to enact it, although the language

of Chief Justice Marshall in *McCulloch* against Maryland would seem to fit the case: "Should Congress, under pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

As this act is not for the purpose of promoting or limiting commerce as a vehicle to proper objects, but is for the purpose of putting the states under duress to adopt a police policy in matters over which they have by the Constitution complete control, there is strong reason why the court might hold the law invalid. But whether it does or not, Congress ought to observe the balance which our forefathers intended between the federal and the state power, and ought not under pretext of exercising a federal power to seize a state power.

There is only one subject further which I should like in a summary way to consider. An amendment to the Constitution is seriously proposed which would vitally affect the balance of power between the state and national governments. It is the "national prohibition amendment," so called. Of all laws that are local and of home application, those of a sumptuary character are the purest type. They concern the intimate life of the people and are affected by their local customs, prejudices, tastes, and predilections. Their effectiveness and the possibility of their enforcement are entirely dependent on local sympathy with them. This is shown in the widespread use of the

local option system. They are therefore peculiarly within the class of laws which it was the intention of our forefathers, in framing our plan of government, to confide to the discretion of the states. I am not here to attack prohibition as a principle. I approve fully the local option system. I agree that it is not too much to ask one individual to forego the use of intoxicating liquors, though he use them however so moderately, in order to take away from his neighbor the temptation to use them in excess. They are not of such a necessity to one man that in the general interest they may not properly be denied to him and his liberty of action be thus restricted. How much good is accomplished by such laws, local option or state prohibition, may admit of question. There has been great improvement among the intelligent classes of the community in the consumption of liquor and in a lessening of its evil effects. This has been aided in a marked way by the industrial and business advantage of temperance among employees engaged in work in which attention and fidelity are of high importance. Public opinion has changed widely on the subject, and the loss of reputation among his fellows that a man now suffers by his over-indulgence has worked great reform. In communities where a majority favor total abstinence, the operation of prohibition laws, I doubt not, whether local or state, has removed temptation from the weaker members of society and has driven out the dives and saloons that were centers of evil influence. The feeling against the saloon evil has been intensified by the egregious audacity

and political effrontery of saloon keepers' and liquor dealers' organizations in every state of the Union, and the feeling for prohibition is often as much stimulated by indignation at the outrageous assumption and exercise of political power by the liquor interests as by a desire to mitigate the drink evil.

The movement for national prohibition has been encouraged by what has been supposed to be the success of foreign governments in interdicting the manufacture and sale of liquor. The action of Russia as a war measure has approved itself to the advocates of prohibition of this country as an instance of what the United States could do. It goes without saying that the question of how practical Russia's order is is yet to be determined. Russia's intimate and searching control of the life of every individual in her vast empire, moreover, presents a very different situation from that which the United States would have in dealing with her population of 100,000,000.

As with all enthusiasts in one cause whose eyes are fastened on a particular evil and whose constant study of the evil destroys their sense of proportion, the wisdom of maintaining the safe structural plan of our government has no weight whatever with the advocates of national prohibition. Heretofore there has been some ground for seeking relief from the national government in the interference with state prohibition laws because of the immunity which interstate commerce in liquor has enjoyed in dry states. But the decision of the Supreme Court holding the Webb-Kenyon bill to be constitutional has swept away that ground, and now the

"bone-dry liquor bill," so called, has made it a federal offense to carry liquor into a prohibition state. There is, therefore, no reason, except the inherent difficulty, why a state within the limits of its boundaries may not completely enforce any prohibition law which its legislature shall enact. Why not, therefore, allow the states to work out the problem and show how much good legislative restriction can accomplish in this sumptuary field? But no, the advocates of prohibition must have a wider and a stronger power. They must have the aid of that single executive, with that large organization directly subordinate, managed from Washington, which works without regard to local influence. The people of one state who do not wish prohibition, and who do not believe in its efficacy, must be made to accept a law regulating their doorsteps and their intimate habits of life because other states desire them to. This, I submit, is a wide departure from the nice balance of state and national powers and its useful results. Such a sumptuary law as this, especially in the large cities (and it is generally in the states which have large cities that prohibition has not prevailed), will require for its enforcement the closest police inspection. Nothing is so easily evaded as a sumptuary law among a people who do not sympathize with it. A perfect army of federal officials, therefore, will be required to carry out such a law in the states a majority of whose people do not approve it. This horde of federal employees, policemen, and detectives, will be managed directly from Washington. They will have to deal with

and prosecute those engaged in the forbidden trade from the Atlantic to the Pacific Ocean, and from the Canada line to the Gulf. The passage of such a law will not drive all the men out of the business now engaged in it, but it will render them a quasi-criminal class. So great will be the difficulty of enforcement that in many cities and in many states the law will not be enforced except intermittently as it may be stimulated by spasmodic efforts of its leading advocates. Nothing is so demoralizing in a political way as the intermittent enforcement of such a law. Those engaged in the illegal traffic will be completely at the beck and call of those engaged in suppressing their business. The political instrument that such a vast machine and army of office-holders will constitute in the hands of a sinister manipulator of national politics, it is most discouraging to contemplate. Nothing is so demoralizing to the effectiveness and prestige of a government as the failure to enforce important laws. I do not wish to put myself at all in opposition to prohibition in states where a majority of the people favor it. It is their responsibility and they can work out the problem; but I do think it fair to cite the instances of failure in this regard in some parts of such states as an *a fortiori* argument to show the failure and the demoralizing failure that must attend an attempt by the national government to enforce prohibition in what are now non-prohibition states. No one who has been familiar with the working of the conservation system in the

West can be unacquainted with the difficulty that has arisen from Washington management of matters that are really of a local nature. The fortuitous circumstance that the national government was the proprietary owner of the public land through the West, of the mineral resources, and of the stream and water-power sites, has imposed upon Washington the business of determining what should be the disposition and regulation of them. Ordinarily such matters would be, and under our general system ought to be, within the control of the state governments. The bitterness of feeling that has been created in the western states against the sound Washington policy of conservation is a good indication of the unrest, impatience, and disgust with the extension of national power to sumptuary matters which this national prohibition amendment would arouse. Those who long for the maintenance of our national government and of our state governments in their pristine strength should pray that the thoughtless zeal of good, sincere, earnest enthusiasts may be defeated in an unwise effort to make one state good by the vote of another.

I believe that in what I have ventured to say on the state of our Constitution, on the improvements that might be made by legislation, and on the dangers that might arise from unwise amendment, I am only reflecting the views which the patriotism, the wise foresight, and the balanced genius of common sense of the man whose birthday we celebrate would approve.

Reactionary Tendencies of Radicalism

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One has but to look about him to be persuaded that the more radical the self-styled reformer claims to be the more reactionary are likely to prove the methods he advocates for the accomplishment of his ends. He claims and proclaims that to his proud and lofty soul has been vouchsafed a vision of promise. Prompted by motives often of the purest altruism, but alas, all too frequently not wholly above suspicion, he yearns and struggles to the attainment of his purpose with a zeal and fanaticism which frets at all convention, ignores all experience, and rejects all reason. His vociferous activity catches up and carries along in its wake a following as strangely assorted as any that ever rode to Canterbury. There are those always attracted by whatever is gaudy and bizarre, those who mistake notoriety for fame, those who see in that which is proposed a means to the furtherance of some pet theory of their own, finally those ever-present elements of discontent and unrest who, because of incompetence or sloth, disappointment or defeat, ambition or avarice, are easily persuaded that in any change lies the possibility of personal advantage.

In certain fields, the results of such theories and efforts are merely amusing or grotesque, and wholly devoid of harmful consequences. But when he turns to spheres political, social and economic, the radical, because he lays hand on matters which are of vital importance, is a factor in our develop-

ment which must be taken account of. We find him, as always, claiming to be thoroughly progressive, but preaching and practicing means to his end which are essentially reactionary. The philosophic anarchist, for instance, proclaims himself an emancipator of the proletariat, a thinker far in advance of modern political standards and ideas. For the achievement of his ideal he preaches the overthrow of all governments, the abandonment of all restraints other than reason.

Saturated with the philosophy of Jean Jacques Rousseau, a philosophy abandoned at the roadside by advancing civilization, he calls for the return of man to the state of nature as the only means of happiness. The practical anarchist and I. W. W. agitator, each claiming to be in advance of his day and generation, each boasting that he has shaken himself free of the restraints and conventions of society, calls for direct action as the means to liberty and happiness. This direct action, however, when analyzed, is indistinguishable from a defiance of all authority and a return to the outlawry commonly supposed to characterize man in his savage state. The socialist, arguing that in the adoption of his policies alone lies the remedy for all our economic ills, holds before our eager and hungry gaze the picture of a social order which, wherever it has been approached in the past, has served only to cramp, if not altogether to suppress, economic growth. The fem-

inist, shrieking for the emancipation of woman from the thralldom of matrimony, preaches a relation of the sexes left behind when humanity stepped up out of the brute kingdom. Finally, a great nation loudly proclaiming itself the spiritual, moral, economic, social and political leader of the world, and preaching that the true happiness of the human race can be found only in subjection to its benign will, coldly and calmly advocates, and as coldly and calmly practices, methods for the accomplishment of its ends which civilization left behind when it dragged itself up out of the moral murk of the dark ages. Even the god which it so loudly invokes is not the Head of the Trinity, not the Christian God, but Thor, a heathen god, or at best the God of Battles of ancient Israel.

The reactionary tendencies of such radicalism are so patent that there is little or no danger that it will make its appeal to any well-balanced intellect. The danger, and it is a very real one, lies in the appeal which it so freely and frankly makes to passion, avarice, and class hatred. How this danger is to be met and combated is a problem of the first magnitude, but any attempt at the solution of which lies beyond the scope of our present discussion.

There remain for our consideration certain other manifestations of radicalism, which though just as truly reactionary are less patently so, and which, because they can be supported by arguments, apparently making an honest and straightforward appeal to the intellect, require the most careful analysis and exposure. Typical of such forms of radicalism are the initi-

ative, the referendum and the recall, and it is to these so-called progressive measures that I would particularly call attention, indicating not only the truly reactionary tendencies of each, but pointing out certain undesirable results necessarily consequent upon their adoption, which, in the opinion of many, more than offset any and all advantages claimed for them by their most ardent advocates.

In the minds of most people the idea prevails that there is some necessary connection between the initiative, the referendum, and the recall. This is probably due to the fact that they almost always hear them spoken of together. As a matter of fact there is absolutely no necessary connection. They are, to be sure, all political devices for securing a greater popular control in the actual work of governing, but that is all. The great argument in favor of each and of all is that they put more power in the hands of the people and are therefore a step toward the democratic ideal. Because of this fact, therefore, the individual who gives his unqualified support to any one of them is almost certain to give it to all. This does not mean, however, that each one of them is not capable of adoption and free operation independent of the others.

The referendum is the one which has been most widely adopted. In many districts, however, it operates only within comparatively narrow limits. Where it has been accorded freest scope it is almost always found working side by side with the initiative. This is but natural, as both look to the same end, direct or popular legis-

lation. In those sections where the back-fire of pure democracy has gained the greatest headway the recall has also been adopted. The object of the recall, however, is not, as in the case of the initiative and referendum, to give the people an actual participation in the work of governing, but to secure a more immediate and effective control of public servants, by constantly waving before their eyes the menace of removal for any act, official or even personal, at variance with the immediate popular will.

Because of the similarity of the end sought, the initiative and referendum can be treated together. As a matter of fact in almost all the states where the idea of direct or popular legislation has made itself effective it has resulted in the adoption of both the initiative and the referendum. In some few states the subjects in connection with which either process may be invoked are limited and in one or two instances the referendum has been adopted without the initiative. For the most part, however, the two have gone hand in hand. Time and space do not permit of a discussion in detail of the minor variations in the actual operation of the principle in the various states, nor is it necessary to the purpose of this paper, for it is the principle of direct government as embodied in the initiative, the referendum, and the recall that I wish to discuss rather than the particular way in which the several states have sought to put the principle into operation. The principle, as applied in the referendum, so far as we shall be concerned with it, may be stated as follows: That wherever a certain per-

centage of the voters of the state, evidenced by their signatures attached to a petition to that effect, call upon the legislature of the state to submit to the voters at large the question as to whether a specified enactment of the legislature shall stand as a law of the state, the legislature is bound to submit such enactment so to be voted on within a specified time from the receipt of the petition. If at such election the measure receives the necessary popular vote in its favor it stands as a law, but if the vote is adverse it is killed. The machinery of the initiative is very similar and in general is as follows: Any individual, or group of individuals, may draft a bill and attach to it a petition addressed to the legislature (or to the secretary of state) to the effect that it be submitted to the people, as in the case of the referendum, which petition, provided it receive the signatures of the requisite percentage of the qualified voters, is in the nature of a mandate to the legislature (or the secretary) which is thereby bound to make provision for submitting the measure to the voters within the time specified by law. If, when so submitted, the bill receives the necessary vote it becomes a law, otherwise not.

It will be seen that in the operation of either the initiative or the referendum the adoption or rejection of a measure lies wholly with the voters. In other words the employment of the initiative or the referendum involves an act of absolute democracy in the field of legislation. This fact is acclaimed by the radical reformer as a great step forward, as the introduction

of a truly progressive feature into our scheme of government. There is, however, nothing new or progressive in the principle of direct legislation. It has always been the acid test of pure democracy and as such is as old as the petty democracies of Greece and Italy, and is thoroughly familiar to all of us today in our New England Town Meeting; so that what is so loudly proclaimed as a great stride forward appears, upon examination, to be in reality a return to political methods long ago generally abandoned as unintelligent and unsatisfactory. As far back as 1787 Hamilton, defending the proposed Constitution of the United States against the charge that the government to be established would fail, just as had the democracies of Greece and Italy said, in the *Federalist*: "The science of politics, however, like most other sciences has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients." He then proceeds to an enumeration of such principles and concludes his list with, "the representation of the people in the legislature by deputies of their own election." In other words the whole history of popular government has, until recently, been away from absolute democracy and toward the development and extension of the principle of representative institutions. This trend finds its explanation in the drawbacks which experience has revealed as inevitably attendant upon the unrestricted application of the principle of absolute democracy. It has been said that "the natural limit of a

democracy is that distance from the central point which will just permit the most remote citizens to assemble as often as their public functions demand, and will include no greater numbers than can join in those functions." That is to say, the principle of absolute democracy can operate successfully only within a territory of very limited extent, and one in which the population is not so numerous as to prevent intelligent deliberation and action, and thus afford an opportunity for the successful operation of the political demagogue and popular agitator. This is just as true today as it ever was, and until there are changes in human nature, of which there are no present indications, it always will be true. Man is a gregarious animal; he instinctively follows the crowd. Furthermore the average man likes to take his opinions ready-made from another; he follows almost blindly the orator or editor who promises him some benefit if he will do so. The principle of pure democracy, therefore, wherever it has been employed has afforded peculiar opportunity to the scheming and unscrupulous.

The initiative and the referendum, in the last analysis, place the entire law-making power absolutely in the hands of the people. The measure or measures submitted are discussed fully in the press and possibly from the platform, and the state (at least in some jurisdictions) shares the expense of printing and distributing to the voters a pamphlet or book containing the titles and text of the measures to be voted upon. The advocates of the system claim that this insures intelligent ac-

tion by the electorate. The facts, however, hardly bear them out. In Oregon the initiative and referendum were adopted in 1902, and they have been more frequently employed and more highly developed there than elsewhere; and for this reason more frequent reference is made to Oregon than to any other state in the course of this paper. In that state, because of the "steady increase in the number of measures submitted, the size of the pamphlet has increased until in the election of 1912 it contained 252 pages. The reduction of the size of the pamphlet of 1914 to 110 pages was due largely to the disposal of the statutes of the assembly of 1913 referred by petition at the special election held for the purpose that year, and to the condensation of form and the use of smaller type." "The pamphlet arguments vary in length, but most of them are short and to the point. They have great variety of merit. The arguments are partisan statements, and could not reasonably be expected to be otherwise. However, some downright misstatements of fact in the pamphlets constitute an abuse which it seems possible to correct." "The extent to which the voters in general make use of the pamphlet is very uncertain. The size of the document, as well as other difficulties, certainly discourage many voters and keep them from reading it at all. Probably not more than one person in a hundred reads the whole of the pamphlet or any considerable part of it even in a cursory manner, much less makes a thorough study of much of its contents. But the pamphlet is used a great deal for reference

to supplement other sources of information, and has probably had most of its usefulness in this direction." "Probably very many voters read nothing else in regard to the measures except the ballot title." (The foregoing quotations are taken from "The Operation of the Initiative, Referendum and Recall in Oregon," by James D. Barnett, Professor of Political Science in the University of Oregon. Professor Barnett's book, being an absolutely unbiased presentation of the workings of the initiative, referendum, and recall in Oregon, and of public sentiment in regard to the same, is a most illuminating contribution to the literature of the subject.) In connection with the foregoing he quotes from the "Ashland Tidings," the following, reprinted in the Portland "Oregonian" of Oct. 3, 1912: "The editor has been again wading through the Oregon political pamphlet in an attempt to form an intelligent judgment on the thirty-eight proposed bills. He finds it absolutely impossible to do so. It is our shame that not one per cent of the voters at the polls in Oregon in November will be able to cast an intelligent ballot." Of course many take a more optimistic view, and all admit that there is no inconsiderable educational value to great numbers of the people in being called upon to perform the legislative duties thus thrust upon them, but it is open to serious question whether the advantage thus gained by the small percentage which conscientiously informs itself on the measures presented compensates for the ever-growing burden which is thrust upon the voters, or for the opportunity afforded the unscrupulous and design-

ing to take advantage of ignorance, passion, and prejudice and mould it to the accomplishment of some factional end.

The burden upon the electorate, in spite of all efforts to avoid it is one which has grown appallingly. Dealing with this phase of the problem Professor Barnett says: "But the amount of legislation attempted is not fully indicated by the mere number of measures submitted, since many of them have been extremely complicated. And it must be remembered that, except in case a special election to consider the measures is called, at the same election numerous candidates for office, both state and local, must be considered; that local measures may also appear on the same ballot; and that other local measures and candidates for local offices may be voted for at an election held soon after." He then quotes from the "Oregonian" for Oct. 25, 1912: "The sample ballot for the state election of 1912 is thirty-four inches long and eighteen inches wide, and it therefore contains six hundred and twelve square inches or about four and one-half square feet. It is nearly as large as two ordinary newspaper pages, and contains the names of one hundred and seventy-six candidates for office and the titles of forty separate measures submitted under the initiative and referendum. On November 2nd, three days before the general election, the Portland public will at a special election pass on the new city charter and the various charter amendments. There are two proposed charters and twenty charter amendments. The ballot is no such barn-door affair

as the state ballot, but it does fairly well in size and variety. Here, then, is a total of sixty-two measures the electorate must study under the referendum, and 176 candidates whose merits it must consider. The grand total for the inspection and determination of the intelligent voter is, therefore, 238 separate and distinct items."

The task thus presented to the voter is truly magnificent, and one for which it is impossible for any but the most conscientious and intelligent to fit himself. It is a task which a large minority, except on fundamental questions of policy such as the liquor question and woman suffrage, refuses to undertake. The tables in Oberholtzer's "The Initiative, Referendum and Recall in America" show that the two bills presented to the people of Oregon in 1904, one of which was a local option liquor bill and the other a direct primary bill, received the attention of 84 and 73 per cent. respectively, of the voters who cast ballots for candidates at that election. In other words there was an average of 21.5 per cent. of those voting for candidates who refused to vote upon the bills submitted. In 1906 there were eleven measures submitted. The average percentage of the total vote for candidates was 76.7. Looked at from the other side, there were an average of 23.3 per cent. of those voting for candidates who refused to consider the measures submitted. The average percentage of those voting for candidates at the election of 1908 who voted upon the eighteen measures submitted was 74.1, indicating that 25.9 per cent. of those voting for candidates abstained from voting on the measures submitted. In

1910 the people were called upon to vote upon thirty-three measures. Note how the number of measures increase at each election. This, it may be said, is the common experience in almost every case where the initiative and referendum have been unqualifiedly adopted, though not in so marked a degree as in Oregon. The vote on these thirty-three measures averaged 70.2 per cent. of the vote cast for candidates, showing that 29.8 per cent. of those voting for candidates refrained from expressing themselves on the questions submitted. The percentages of those voting on these various bills ranged from 61 to 87. There were only three instances in which measures received the attention of 80 per cent. or more of those voting. In each case the measure dealt with some phase of the liquor question and of the three bills two received the attention of 87 per cent. and the third 86 per cent. of those voting. It will be noted that as the number of measures increased the percentage of those giving attention to them steadily decreased, and that the vote on all sixty-five measures indicates an average of 25.1 per cent. of those voting for candidates as abstaining from voting on the measures.¹

¹See an article entitled "The Vote on Measures in the Election of 1916," by Royal J. Davis, in the New York "Nation" for February 1, 1917, in which Mr. Davis, referring to the lack of interest in political measures, gives the following facts: "The proposal to abolish the senate in Oregon, in number of votes received both for and against, stood thirteenth in a list of twenty-nine measures voted upon at that election. The corresponding proposal in Oklahoma was last in a list of four. In Arizona, in November, 1916, it came ninth in a list of twelve, and the Arkansas proposal was saved from being the last of five by another proposal dealing with election machinery." In regard to other questions, Mr.

When it is borne in mind that the vote of the other 74.9 per cent. is, for the reasons indicated, large unintelligent, one is forced to the conclusion that these much vaunted devices for bringing the people into their own can hardly be credited with making for wisdom and efficiency in government. That this is felt even by those who warmly support the practice is indicated by two passages from the "Oregonian" of March 2, 1907, and the "Oregon Journal" of November 21, 1912, respectively, both quoted by Professor Barnett, as follows: "Upon all measures submitted to it, the electorate of Oregon has acted with a ripe and deliberate wisdom which compares favorably with the proceeding of the legislature." "We are all under hallucination as to the wisdom of the average legislator. He has no monopoly of brains. He has no corner on honesty. He has no monopoly of legislative wisdom. There is nothing hallowed about the Oregon legislature. There is no halo about the head of the average member. He is just a plain man and often a very common one." What a pitiful apology! All that can be said of these two instrumentalities, which were and are acclaimed as so progressive and which were to accom-

Davis shows that although the liquor problem continues to hold the attention more effectively than any and all others, even it failed to call out anything like the vote given to candidates at the same election. According to his figures, "in Maryland, it received 68 per cent of the total vote for President, and in Nebraska, 87 per cent." The lack of interest in other measures submitted in these two states he shows by the fact that they received but 44 and 65 per cent respectively of the vote cast for President. See also a very instructive article entitled "Second Thoughts of a Sobered People," in The Unpopular Review for January, 1917.

plish so much, is that, in operation the results compare very favorably with those obtained from a very mediocre legislature.

Space does not here permit of a consideration of the effect upon the standard of ability and integrity of the legislature of this ever-broadening use of the initiative and referendum. But it needs no argument to convince one that a legislative body, whose every act no matter how wise and farseeing, is subject to rejection if it be contrary to the unintelligent or selfish caprice of frequently an actual minority of the qualified voters, is hardly calculated to attract to its deliberations men of more than the most ordinary attainments and standards. In this connection the following passages quoted from the "Oregon Journal" by Professor Barnett are significant: "It is manifest that the public has largely lost confidence in the body. The action of past assemblies has been such that there is little public faith in the capacity and good purpose of the representative system. The public seems, after the use of both plans, to have more faith in the initiative and in the judgment and capacity of the people than in the legislative body or the judgment of its delegated representatives. The view is so general and so marked that there are frequently heard expressions favoring ultimate abolishment of the legislature."

The situation is a curious one, but one which seems to characterize the great bulk of the alleged reform programmes of our self-styled progressives. They complain that the legislature, because of ignorance, incompe-

tence, or corruption, fails to give expression to the popular will. They fail utterly to grasp the fact that the legislature is just what the people make it. The people have the absolute power to send to the legislature just the type of representatives they choose. If they fail to do so because of lack of time or interest, or because it is impossible for them to ascertain the qualifications of candidates, it strikes a thoughtful student of the science of politics as pathetically amusing that like a flock of sheep, at the call of those whose motives and intelligence are not always above question, they turn with enthusiasm to an alleged remedy which, if conscientiously employed, tremendously increases the demand upon their time and attention. That legislatures have been incompetent and corrupt, and are so today, cannot be denied, but the cure for these evils lies in a greater initial concern by the electorate that they send to the legislature competent and upright representatives, rather than in casting upon the electorate burdens which, in all but a very few cases, because of their complexity and technicality, the vast majority of the electorate are totally unqualified to discharge, and in which a very large percentage take little or no interest. The initiative and the referendum, though they may truly be styled radical are in essence reactionary.

One of the greatest advances scored in the science of politics was when the people of the United States conceived and adopted the principle of a constitutional or fundamental law which was wholly beyond the power of the legislature to change and which was beyond

even the power of a majority of the people to change. It marked the birth of truly popular, as distinct from majority, government, and by guaranteeing rights to minorities established the first really stable democratic republic that the world has ever seen. Impatient with evils which are wholly the result of the people's own neglect, the advocates of the initiative have secured its application to the fundamental law of their states as well as to the ordinary statutory law and have thus abandoned this great gain. For, again to quote Professor Barnett and the "Oregonian," cited by him: "It is clear that so far as initiative legislation is concerned, there is practically no constitution in Oregon." "The constitution of Oregon is only a check or restriction on the legislature. The people's will rises above it." "There is no constitution, for it is subject to such flux and change as to no longer be the mainstay of our government." "The only constitutional protection enjoyed by the people of this state today lies in the federal constitution, but as that instrument bears only indirectly upon important questions, it is quite evident that in all ordinary matters of government the people of Oregon are practically without constitutional protection." "It is an evil of our initiative and referendum, that a slender majority can on the exciting impulse of a single election now ride roughshod over all the rights of a minority, even to sweeping away any or all of the elementary constitutional safeguards which the experienced wisdom of ages have established as supposed permanent guarantees of the rights of individuals and of minorities, against

sudden encroachments of majorities." In the name of progress, blind leaders of the blind have brought the people of Oregon back into the midst of the very conditions which in the past have proved fatal to self-government. Could Junker, Bourbon, or Tory demand anything more reactionary than such radicalism?

Turning now to the recall we find, as has already been said, that the chief object is to secure a stricter accountability of public servants to the will of their constituents. The machinery whereby the recall is put into operation is in brief as follows: There may be filed with the proper official, local or state, a recall petition signed by the requisite percentage of the voters at the previous election, qualified to vote for a candidate for the office, the holder of which it is sought to recall. This percentage is much higher than that necessary to secure the submission of a measure to the people by the initiative or the referendum, twenty-five per cent. usually being required. The petition must set forth in general terms the reason for demanding the recall. A petition so filed requires the legislature, or such body as is charged with the conduct of local elections, as the case may be, to provide for a special election for filling the office designated. The person whose recall is demanded is without nomination a candidate to succeed himself. The process may be invoked in respect of all elective officers, executive, legislative and judicial. Its employment in connection with the judicial office I will discuss later, confining attention for the present to the other branches of the government.

There is, of course, nothing new in the principle of tenure of office during pleasure. Heretofore, however, it has been applied in general only to appointive as distinct from elective offices. Its general application to the latter is the real innovation. So far as executive and legislative office is concerned, it is, in theory, but an extension, and a logical extension, of the principle that frequency of election is the surest method of securing in the officer a true sense of responsibility to his constituency. Were this the sole thing to be considered, and could some means be devised to prevent an abuse of the device, or were there no other possible way for securing the desired sense of responsibility in public servants, the adoption of the recall might be resorted to as a necessity. But such is not the case. True responsibility to a constituency does not involve an immediate and slavish response to every whim and passion of a temporary majority. On the contrary it frequently becomes the duty of those holding public office to resist popular demand for the doing of that which is wicked or unwise. This is as true in the case of foolish or improper legislation, as in the case of lynchings and race-riots. The difficulty with the recall is that it sweeps away, or greatly nullifies, all official restraint. In times of considerable public excitement, when the blood is hot, opposition to popular demand is almost certain to subject the officer daring such opposition to a recall contest. Illustrative of such a situation is a case discussed in the "Oregon Journal" of July 7th, 1911, quoted by Professor Barnett, as fol-

lows: "In reality it is not Judge Coke that the good people of Rosenberg are after. Their real fury is against McClellen, but for the moment it is Judge Coke that is in sight. The public sympathizes with them in their indignation. McClellen shot down a highly esteemed citizen. He escaped punishment. The indignation of the Rosenberg people is a natural consequence. But it was not Judge Coke that pulled the trigger of the murderous revolver. McClellen did that. It was not Judge Coke that fixed the requirements of the jury instructions at the trial. It was the law of the land that did that. Parts of the very instructions used were the dictum of the Oregon Supreme Court in the Morey case. On sober second thought the Rosenberg people must realize that fury is being visited upon the wrong man." On another occasion, after the conviction of labor agitators directly implicated in the blowing up of the Los Angeles Times building, the labor press of the country burst into a frenzy of attack upon the judge before whom the trial was conducted, and a certain leader high in the councils of labor and the editor of an influential labor journal, delivered himself in substance of the following significant outburst: "Give us the recall and we can put on the bench those whom we can rely upon not to decide against us." Professor Barnett gives numerous other instances where the recall machinery has been put in motion from motives and under circumstances which constitute a serious abuse. For instance, in one case "the petitioners charged that the officers (whose recall was sought)" had been careless and ex-

travagant in the management of the county business. But," adds the author, "it is somewhat significant that the leader in the recall movement was a bridge-builder who had failed to secure any of the bridge-contracts." In another instance, "the county judge of Curry County was subjected to a recall election upon the charge that he had been instrumental in the expenditure of public money 'in ways unauthorized by law and of no benefit to the people,' that he had disregarded the 'rights of petition of the taxpayers for the appointment of certain county officers, and that he had failed to conduct the county business on business principles, to the great loss of the tax payers.' However, the real motive for the movement was revenge against the judge for his part in protecting the county treasury against some of the recallers and in disappointing others of their hopes for appointment to office." In still another case it appeared that the motive was "wholly the outcome of a quarrel between two sections of the county in regard to the route which should be followed in road construction, and it was instituted by the section not favored by the court's decision." To take one more instance, "it was charged in the recall petition that the officer (the mayor) was inefficient, immoral, untruthful, and arbitrary in the exercise of his authority; but a motive which was influential at least to some extent was the hostility of certain property owners caused by the mayor's action in opening streets which they had illegally closed." In the majority of these cases the officers involved were sustained. This fact, however, does not meet the objection

that the system is subject to great abuse, nor does it mean that even in such cases it has not worked an injustice to the officer and a detriment to the locality.

It is difficult to see how abuses such as have been cited could be prevented without so altering the system as to deprive it of all advantage claimed for it by its advocates. As it stands, however, every public servant who, in the performance of his official duty, or even in private life, has been so unfortunate as to incur the displeasure of a powerful individual or faction is exposed to the necessity of defending his good name official and private against vague and irresponsible innuendo and attack at great cost of time and energy, and often at considerable expense, while pending the recall campaign, the locality is deprived of the services of the official involved, and is thrown into a hot factional fight.

The advocates of the system claim that there is no greater disadvantage in such a situation than is incident to every general election. It is doubtful, however, whether this is true. To be sure, in every general election the candidates who seek a return to office are exposed to partisan attacks upon their records, and therein lies one of the great advantages of republican government. But there is this important fact to be noted, the occasion for such examination of his record is normal, automatic, impersonal, and does not of necessity carry with it any breath of suspicion. Furthermore public attention is not concentrated upon a single individual. In the recall election, on the other hand, the subject of the pe-

tition is in a wholly abnormal and altogether disadvantageous position. He starts the fight under charges which, however false they be, place him under suspicion. Men are always far more ready to believe evil of another than good. It is far easier to excite suspicion and ill will than to retain confidence and trust.

While in many cases the fear of being subjected to a recall serves to restrain malfeasance in office, there are all too many cases in which the honest and efficient office holder has, most unjustly, been made the victim of abuses which apparently are inerradically bound up with the system itself. When it is observed that much, if not all, that is claimed for it could be gained without the disadvantages noted, by merely shortening the term of elective officers generally, the greater part of the argument in its support loses its weight.

The application of the recall to the judicial officer is a manifestation of radicalism, the reactionary tendencies of which are far more dangerous. It is a direct blow at the impartial administration of justice according to law. By rendering the bench absolutely subservient to popular will it substitutes majority government for popular government, a government of men for a government of laws. The absolute independence of the judiciary is the *sine qua non* of the impartial administration of justice according to law, and the recall of judges deprives the bench of all independence. The demand is most insistent from those who are deeply interested in some scheme of so-called social justice the constitutionality of which is doubtful,

or has actually been denied by the courts, though in some instances it is loudly called for by those who are impatient of any and all restraint upon majority rule, and who ask, not that the courts shall decide a case in which they are interested according to law, but in their favor. This latter group, though small, is not so small that it can be ignored as a growing menace to our institutions.

The argument most commonly advanced in support of the judicial recall is that in matters which concern the public welfare the will of the people should be free; that in such matters the will of the court should not be permitted to interfere with the will of the people. This argument utterly ignores the fact that legislation claimed to be for the public welfare, that is, alleged to be an exercise of the police power, may be contrary to the provisions of the constitution of the state and also contrary to the provisions of the Constitution of the United States. Furthermore, to talk about the *will* of the court being interposed as a check upon the will of the people is utterly to ignore the function of the judiciary. If a state legislature in good faith, or otherwise, under color of exercising the police power, that is, under color of making provision for the general welfare, passes a statute, and in the course of litigation the constitutionality of that statute is brought in question and the court decides against the validity of the statute, it is not a case of the *will* of the judiciary opposing and obstructing the will of the people. It may well be that the judges, one and all, are entirely in sympathy with

the end sought. The duty imposed upon the court, however, requires that, ignoring all questions of expediency, putting aside all self-interest and desire, without fear or favor, it declare the *law*. When the question before the court is the constitutionality of a statute there is but one thing for the court to do. It must compare the statute with the constitution, and if, in their expert judgment, the provisions of the statute are forbidden by the constitution, either state or federal (for the judges in the several states are sworn to uphold the Constitution of the United States) then they must declare the fact, and the statute must give way. Its constitution is the fundamental law of a state and such restrictions as it contains on legislation are binding on the legislature of that state, and attempted acts of the legislature which violate such restrictions are for that reason null and void. So long as there are constitutional limitations on legislative powers, and those limitations are to be worth anything, there must be a body independent of the legislature, specially trained, and constitutionally authorized, to determine whether or not, in the exercise of its powers, the legislature has overstepped the limitations placed upon it.

A brief illustration will suffice not only to show the part played by the courts in passing upon the constitutionality of legislation, but also to dispose of the argument that they oppose their will to the will of the people. A state legislature passes a statute alleged to be for the advancement of social justice. Under the terms of the statute, A. claims a certain payment from

B. B. maintains that to give effect to the statute will be to deprive him of a right guaranteed to him by the constitution of the state or of the United States, as the case may be, and he refuses to make the payment demanded. A. then sues B. under the statute and B. pleads that the statute is unconstitutional. Now it has always been the duty of the judge to ascertain and declare the law governing the case before him, and to render his decision strictly in accordance with the law so ascertained and declared, and this, in substance, is what every judge, state or federal, is sworn to do when he takes his oath of office. In the case under consideration, then, the judge is bound by oath to ascertain and declare the law upon which depends the decision of the controversy between A. and B. and having done so to render his decision in accordance therewith. If, after careful and scholarly comparison of the statute with the clause of the constitution which is the basis of B.'s defense, he finds that the two are manifestly and irreconcilably in conflict, there is but one course open to him. The constitution is the superior law of the state and when the legislature of the state has attempted by statute to do something forbidden by its constitution, or the effect of which would be destructive of rights secured by the constitution, the constitution must prevail and the statute give way. To argue in such case that the court is opposing its will to the will of the people is to claim the exact opposite of the truth, for the court in deciding the case in accordance with the terms of the constitution is deciding it in accordance with the will of

the people expressed in the most solemn and binding form known to the law. The decision may be at variance with the will of a temporary majority, but it is not at variance with the law, nor is the judge rendering it acting otherwise than in strictest accordance with the oath which the people have exacted of him before allowing him to take office. Those who urge the recall of a judge on any such grounds put themselves on record as demanding judgments by their courts, not in accordance with law, but in accordance with majority will, as demanding not popular government but majority government, as demanding not a government of laws but a government of men.

But, it is argued, the power is essential to the people that they may be rid, not of upright judges whose decisions are counter to the popular will, but to remove judges who are owned by "the interests" or bought up by powerful factions. The answer to such a contention is brief and final. If the charge is true, there is already an ample remedy in the power of impeachment, the exercise of which calls for an orderly and intelligent examination of the evidence upon which charges are based and a truly judicial determination of the issue. If, on the other hand, the charges are nothing more than irresponsible and unscrupulous attacks, born of an impatience with all restraint of factional whim, then surely the judiciary cannot be too thoroughly protected in office.

The idea of a judiciary which is subservient to a controlling power is without limit reactionary because it is of the very essence of tyranny. It makes

no difference that the controlling power is a popular majority. The entire history of democratic government testifies that there is no more ruthless or more crushing tyranny than the Juggernaut of an irresponsible and determined majority. That the recall of judges has not resulted in removals from the bench for the causes stated, in those of our Western states where it has been adopted, is due, not to the intelligence and self-restraint of the voters, and therefore, a refutation of the arguments against the system; but rather to the fact that the unrestricted operation of the initiative and referendum afford the majority a means of enforcing its will which renders the recall altogether unnecessary, as a means of nullifying any and all state constitutional restraints. That this is clearly understood by the people of Oregon is evidenced by a passage quoted from the "Oregonian" by Professor Barnett: "We believe," says the editor, "that if the courts declared some popular law unconstitutional, the people would not seek to recall the court in the absence of corruption, but would amend the constitution through the initiative." "Probably the recall will never be invoked in Oregon against a judge unless corruption is charged."

No consideration of the reactionary tendencies of radicalism would be complete without at least some reference to the proposed recall of judicial decisions. The proposition in brief is that, in cases where the courts have declared a statute unconstitutional, the statute should be submitted to the people that they may, through the ballot, express

their will as to whether the statute (in spite of the judicial decision) shall stand; that the people, in other words, should have it in their power informally to amend their constitutions. The doctrine is, of course, of no importance in those states where the initiative and referendum have received full and unrestricted recognition, for in such states, as has already been pointed out, "there is no constitution, for it is subject to such flux and change as no longer to be the mainstay of government." In those states, however, which have not gone back to the follies, injustices and tyrannies of absolute democracy, which have not repudiated the doctrine that the minority has rights, or ought to have rights, which should be beyond the power of a mere numerical majority to override, the introduction of such a principle into their fundamental law would be attended by the most serious results.

To argue that the process suggested of avoiding an unpopular decision of the court is merely an informal method of amending the constitution is to ignore the difference between an amendment of a constitution by the alteration, elimination, or addition of a provision laying down a general principle and the overriding of a constitution in a particular case at the will of a majority. It is one of the fundamental concepts of a popular government, it is urged, that the people, after careful deliberation, have the right to change their basic law, and it is urged that action in the exercise of the proposed power would be taken only at the end of two years, and after full and free discussion, first in the legislature where

the bill was under consideration; second, in the courts, at the time when the act was in litigation; and finally, through the medium of press and platform. There never was a better example of the sophistry with which the radical seeks to secure his ends. How much does the average man, or even the lawyer, know of the various bills introduced into our legislatures, or, knowing of their introduction, how closely does he follow their discussion, or can he, it being for the most part in committee? How closely does the average man follow the litigation of a constitutional question, or supposing he makes the effort, how competent is he to decide for himself, from the arguments of counsel, or from the opinion of the court, the question of constitutional law involved?

Finally, when the matter is thrown open to full and free discussion in the press and on the platform, how much will this discussion contribute to an intelligent, honest, and disinterested decision of the question when the final vote is taken? A vast portion of the voting population never reads an editorial, and, if the editorial confined itself strictly to a discussion of the constitutional points involved, could not follow the argument if it did. The truth of the matter is that the final vote would be determined wholly by self-interest, prejudice, passion, and class hatred. It could not be otherwise, for it would be impossible to consider anything but the provisions of the particular act under discussion, with the result that expediency would become the sole test of constitutionality.

Towards the close of his essay, "Why Should We Change Our Form of Government?" Nicholas Murray Butler, after examining the very propositions we have been considering, writes as follows: "This sort of thing has all been tried. It was tried at Athens to the full, and the Athenian Democracy is now an interesting and instructive memory. Why must we Americans always be children? Why must we always seek to learn over again at our own cost the lessons of experience which the world's history is ready to teach us for the asking? Why should we not be permitted to perfect our form of government instead of changing it? Why should we not move forward in genuine progress on the lines of the development of the last five hundred years? Why must we turn back and begin all over again to climb the painful hill of difficulty which leads to representative government and liberty? It is to me a continual source of amazement that those who urge these revolutionary changes upon us do not seem to know anything of the recorded history of government and of human society. They do not appear to know that the instruments which they offer us as new and bright and helpful have long since been discarded as old, rusty and outworn."

I am very much afraid that there are many who cannot plead ignorance of history as an excuse for misguiding their fellow citizens. Nor am I persuaded that, without a tremendous uplift of the common standard of civic morality, the lessons of history, were they written in flame across the heavens, would outweigh, with many, mo-

tives of selfishness, greed, and ambition. History has its lessons and they would be of incalculable value to us would we but read them and act upon them, but they will remain unread, or, what is worse, ignored, until we have attained to a higher civic morality than that which says with one, honored with the highest office in the gift of the people: "Damn the law; we want it and we will have it." If, however, we read and act upon the lessons which history affords, whither does the path of true political progress for our democracy lead? President Butler's reply to this question is: "It leads, in my judgment, not to more frequent elections, but to fewer elections; it leads not to more direct popular interference with representative institutions, but to less; it leads to a political practice in which a few important officers are chosen for relatively long terms of service, given much power and responsibility, and then are held to strict accountability therefor; it leads not to more legislation, but to infinitely less; it leads to fixing public opinion on questions of vital principle, and not to dissipating it among a thousand matters of petty administrative detail; it leads to those acts and policies that will increase the desire and interest of public-spirited men to hold office, and not to drive them away from it as with a scourge."

Can any thoughtful man deny that along such a pathway lies the road to true progress? History and reason answer "no." All progress involves change, but this is very different from saying that all change involves progress. When, in the light of history,

to which our own ideals and institutions contribute in no small degree, we try to spell out a future worthy of a great people surely the voice of reason

bids us foster and cherish a conservatively intelligent progressiveism and resist at every turn the reactionary tendencies of radicalism.

The Public Welfare Under the Constitution

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It is but stating a truism to say that the federal Constitution created a government, under a system combining both positive and negative rules and provisions, of equal authority and importance. It will not do to hold that one provision of the original Constitution is of greater validity and sanctity than another. They are coordinate rules and must operate in harmony for the purposes intended. A different question will arise when the amendments are to be considered. The positive provisions confer powers upon the nation, while the negative provisions give rights and protection to the individual citizen. It has from the beginning been held that the nation can exercise no powers but those expressly granted and such implied powers as are necessary to national existence. The courts refuse to acknowledge that a limited national government can have "inherent" powers; but a citizen, a free man, does retain inherent rights given by creation itself.

There is an effective instrument promiscuously used to wear away the citizen's constitutional protection, and it is designated as the promotion of "the public welfare." It is sometimes called the "police power" or the "public policy of the state." Whether these three

terms are legal equivalents we shall not now attempt to say, but shall herein be content to consider the question of the "public welfare" under our system of government.

The public welfare is expressly mentioned in the preamble to the Constitution and in section 8 of Article I. A preamble is not a binding part of a law. It is simply a formal introduction or statement showing the reason or necessity for the binding rules which are thereafter established. In section 8, it is merely provided that Congress may raise money and expend it for the common defense and "general welfare" of the United States. There is later a clear provision that Congress may declare war, raise armies, and create a navy, but no express power to legislate for the general public welfare. If there were any such power given, an oligarchy would have been created instead of a republican government. But whatever the preamble means, it does not relate to the legislature alone, but to the whole government, to Congress, the executive, and the judiciary. If one department can under the preamble exercise a general-welfare power, so can all three of the departments, and the nation would be one of autocratic power. And how can three depart-

ments exercise at will the same right and power? The legislature is not the whole government, important though it may be.

We must look to the express grants and limitations to determine whether Congress can legislate for all that it believes to be for the public welfare. The preamble states that the people ordained the Constitution "to establish justice, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Can it be that Congress may exercise its unbounded will in carrying out any and all of the objects enumerated in the preamble? If the national power is to be found in the preamble, why all of the very carefully designated grants and prohibitions in the body of the Constitution? The learned and skilled men who spent months in drafting that document were not in the convention for frivolity and amusement, but for a great work, a serious work, and one that was intended to last for ages. They granted no general power to Congress to enact laws for the general welfare. Such a power is not found in the Constitution and would be wholly foreign to and incompatible with its principles had it been placed there. It is impossible for constitutional power to be unbounded and yet hedged about with carefully drawn limitations.

The purpose of all government under a written constitution is to promote the general welfare of the people. And the original Constitution, with the amendments, with all the terms, grants, and restrictions, prescribe the exact

length and breadth of the public welfare, and this welfare can be found nowhere else than under the express provisions of this higher law. There are not two kinds of public welfare, one under the express terms of the Constitution, and another, a hidden and lurking species, to be brought forth wholly at the will and caprice of the legislature. And let us not forget that the preamble relates to the whole government, and not to one department alone.

If Congress can act wholly on this public-welfare theory, and if it was the intention of the founders to confer this unbounded power, it would have been sufficient for the Constitution to say: "Congress shall have power to legislate for the general welfare." The other provisions could have been eliminated, and on this theory the public welfare would have become the Alpha and the Omega. Fortunately this was not the intention and it was not the act. Express powers were granted, and others in as strong terms were withheld. The powers given could have no greater potency than the privileges which were denied. Jefferson, while Secretary of State, was not in accord with the radical proposals of Congress to stretch the powers granted and convert a government intended to be limited into an unlimited one. He did not think that power to raise money for the "general welfare" permitted Congress to do everything that it might deem to be for the "public welfare." (Jefferson's Works, Memorial edn., vol. 1, p. 291.)

When Congress was granted powers to regulate commerce, coin money, es-

tablish post-offices, and in the same breath denied the right to pass bills of attainder, or to raise taxes except in the prescribed mode, and denied the right to levy export taxes, etc., the granted powers were modified and limited to the full extent of the restrictions. We cannot give liberty or power with one hand and withhold it with the other; the affirmative grant is simply tied with a string; it is a grant in leash; and in this situation, where do we find the public welfare?

The original Constitution was adopted in 1787, and the first ten amendments, known as the Bill of Rights, were proposed and passed by Congress in 1789 and later ratified by the states. It is evident even to a layman that no provision of the original can stand if in any way opposed to the amendments. The latter were the last words of the people as to the powers of government and the public welfare, and were intended to limit and revoke all prior powers in conflict with them; for it would be paradoxical, and decidedly heterodox, to hold that the original instrument could overthrow the amendments. Precisely as in the case of a statute, the Constitution is changed or superseded by a conflicting amendment. Even in so far as they may relate to the public welfare or the police power, prior grants of power must give way to a constitutional amendment.

Some able lawyers and judges contend that the power to regulate commerce has no limitations in the hands of Congress. But this is a grievous error, for the text of the document alone proves the fallacy. While Congress is given power over commerce,

yet in a few paragraphs following it is forbidden to tax exports or to give any favor in commerce or revenue to one port over another; and it is further materially restricted by the Bill of Rights and the thirteenth amendment. These amendments rule paramount over all conflicting prior provisions of the original Constitution. It would be idle to contend that the sixteenth and seventeenth amendments did not change the Constitution as to assessing income taxes and the election of Senators. Power over the public welfare as to these matters is now to be found in these amendments. If anything is settled beyond question, it is the proposition that the broad powers of the national government are full and complete except when modified by other parts of the Constitution. This proposition was laid down at the beginning of the nation by Chief Justice Marshall in the case of *Gibbons against Ogden*. In conferring upon Congress the power to regulate commerce and to coin money, broad language is used; still this would not permit the government to take from the citizen material to build custom houses or gold to coin into money, except upon paying compensation. The general powers are not alone modified and restrained by other parts of the original Constitution, but, most assuredly, by the amendments. This is no longer a debatable question, for it is firmly established by numerous decisions of the Supreme Court. The same principle is strongly held by Justices Day and Pitney in the recent decision on the validity of the so-called "Adamson eight-hour-day law." And it may be wholesome to recall the re-

mark of Justice Harlan in the Adair case, that "the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution."

In *Marbury against Madison*, Marshall goes fully into the question of powers and limitations and says that the Constitution is either a superior and paramount law, unchangeable by ordinary means, or it is like other laws, alterable when the legislature shall please to alter it. And in speaking of officials taking the oath of office to support the Constitution, he says that if the Constitution forms no rule for their actions, and if such be the real state of things, "this is worse than solemn mockery. To prescribe or to take this oath becomes equally a crime." His view clearly was that there could be no power or duty with respect to the "public welfare" that would excuse the violation of the oath by any national official.

The thirteenth amendment is the only part of the organic law which applies solely to labor, and if it has any vitality, neither slavery nor involuntary servitude can exist within the United States. Why should not this amendment have had commanding force in settling the Adamson eight-hour controversy? In no work can a man be compelled to serve against his will, except under the necessities of war, and perhaps in public office. If one man, not in combination with others, desires to stop work, in civil pursuits, he has this liberty, because involuntary servi-

tude cannot exist. The rule is binding against both master and servant. It is within the province of the law to prevent men from quitting work in a body, but a single laborer can quit at his option, because he is protected even against himself. Who would repeal the thirteenth amendment? It is, with few exceptions, supreme over the public welfare claim, for labor no longer has a master, and if labor is not bound to serve, how can the employer be bound to employ?

The fourteenth amendment is a restriction imposed by the states in combination against any one state, and in clear language protects the citizen against specified state action; yet it is being whittled away by the courts under the plea of the public welfare and the police power. The states in union believed it to be for the public welfare to place these restrictions upon action by any one state, and gave express power to the nation to exercise control over the public welfare in this behalf. Then how can any one state possess the power over the public welfare and the police power which it has granted away by the fourteenth amendment? This amendment cannot be a dead letter; it is binding until it is repealed or amended.

The people are a constitutional part of the state and national governments. They hold ultimate sovereignty. By their voting power they inaugurate governmental activity. They are the basis of the war power and furnish the money to preserve the life of the nation. Even Congress is elected by the people, and the evidence of the election is returned by state processes. Congress-

sional elections are only biennial, but there are almost incessant elections occurring within the cities, counties, or states, and these local elections are of vast national importance, for national problems are brought into discussion in such local contests and it is fitting that this should be so. Congress cannot be held responsible to any other authority while acting within its powers, and the same privilege is held by the voting multitude while performing its constitutional functions. Every department should perform its true office with efficiency and fidelity. The nation's strength depends upon the vigor, intelligence, prowess, wealth, and patriotism of the citizens. How can the people be intelligent, strong, efficient, and patriotic except by proper instruction, communication, and advisement by and among themselves on governmental questions? It should not, however, be conceded that socialism or direct legislation by the initiative and referendum are to be indorsed because of the statement that the people exercise important functions in government. It must be admitted that the people, at present, have contracted away to the nation and the states a large part of their governmental powers; and it is mathematically true that the total original power has been reduced and restricted to the extent of the powers which have been relinquished, and that to-day the active power in the people is the remainder. But because the people have yielded up a part of their prerogatives it does not follow that they now have none, any more than it follows that they still have all. The amendments to the Constitution tabulate most clearly

many of the important rights remaining in the hands of the people.

There are those who proclaim that the Constitution is "outgrown," that progress has rushed far beyond and left the Constitution far to the rear. This is an evident fallacy, because the higher law has been amended down to date. It may be that our political vision has become distorted or progressively afflicted. The founders of our government started from the English monarchy, and drafted a document which stopped at the middle ground between absolutism and complete democracy. They created a republic. Madison, in his articles in the "Federalist," clearly shows that they were establishing a republic and not a true democracy. The Constitution in Article IV says: "The United States shall guarantee to every state a republican form of government," that is, the same form of government as that of the nation itself. Jefferson even proclaimed that he was a "republican." This meant democracy without the fangs, democracy with its evils eliminated. If now illusive ideas of progress draw us either forward or backward, cause us to abandon the safeguards of this beneficent republic, there can be no other destiny but to retrace our steps to monarchy or else to go down by stages to pure democracy and then to anarchy. The Makers builded and limited the government to a scientific line. If year by year we break over and go beyond this line, we must of necessity evolve and grow into something else than a safe and true republican nation. Under this kind of progress what shall the end be?

The Bill of Rights protects all in their liberty and acquisitions. The civil war amendments give to both white and colored labor freedom from involuntary servitude, and should give security against a flood of class legislation. There can be but one general system of morality, of honor, of patriotism, and of justice. We are protected and act as individuals and our duty to the state and our neighbor is individual. There is an over-supply of

political class propaganda, of fads and fancies, and it is dangerous. When we preach liberty we cannot deny like liberty to our neighbor. We must not take the shackles from one man and immediately place them upon another. The Constitution in theory says: "Take them from those who are bound, and keep them away from all." The organic law that so provides deserves to be immortal and should live forever.

War and the Constitution

The American people should remember that war does not abrogate or even suspend the Constitution of the United States. It brings into operation great powers, necessary to its successful prosecution, in both the executive and legislative departments of the government. But those powers are not created for the emergency, and their exercise is neither revolutionary nor unconstitutional. They were latent in the Constitution. They were provided as a powerful weapon against the day of need. They are not for the subversion of liberty, but for its salvation. With us there is no such thing as the "suspension of constitutional guaranties" now actually in force in Spain and authorized by the constitutions of the Latin-American countries. Our constitutional rights remain, though now the state demands of us extraordinary service. But it is not service wrested from us by a tyrant. It is service to which our Constitution pledges us, and which we gladly yield in the moment of necessity.

For war is not a normal state for civilized nations or for men. It is an excrescence, a maleficent growth, which must be cut out at whatever cost of effort and suffering. Each of us must bear his share of the burden; each will suffer the pain. It is therefore a time to make heroic sacrifices for the sake of ultimate freedom. And it is a time to show that democracy can endure discipline.

What then is the part of the good citizen? Without thought of personal glory, he will humbly seek how best he can serve the state. He will give his loyal support and obedience to the constituted authorities. He will utter no public word of harsh criticism against those upon whom lies the great responsibility. He will pay his heavy taxes without complaint. If need be, he will bear with quiet patience an abnormal control by government of his business, his personal activities, even the intimate details of his daily life. For this is not submission to autocracy. It is the unanimous agreement of a

whole nation of free people to pay the great price of the great end they seek, and to put their willing trust in the leaders whom they have appointed to make good their high resolve.

But when the stupendous task is achieved,—when at last the world is purged of the horror of war and made again a fit place in which to live,—we shall see to it that, having fought for freedom, we shall not be mocked with its empty name; that, having made the oblation of blood and treasure upon the altars of Democracy, the sacrifice shall not have been in vain. For the

Democracy which is to emerge from the travail of a world at war must be worthy of the pangs that gave her birth, must be noble in purpose and righteous in rule. It may be that she will be somewhat more stern of mien. It may be, too, that something of joyousness has fled this earth to return no more. But not so the eternal principles of justice, the unchanging affirmation of human rights, the inestimable liberties of freemen. Upon this foundation the Democracy of the future must rear the structure of her temple; these ideals she must cherish in her heart of hearts.

The New Constitution of Mexico

Superseding the constitution of 1857, the new "Political Constitution of the United States of Mexico" was prepared by a constitutional convention which sat at Queretaro, was signed by the delegates January 31st, 1917, and was promulgated February 5th. On the 11th of March, elections were held for the chief officers of the federal and state governments and the members of Congress, but the constitution as a whole became operative on the first day of May.

Politically, socially, and industrially, the purpose of the new constitution is unmistakable. It is the reconstruction of Mexico. One who studies it merely as a formal document will altogether miss its true significance. Only when it is viewed against the background of history and of present actual conditions can it be seen in its true proportions. And briefly, the five chief means for

the reconstruction of Mexico, as embodied in the constitution of 1917, are these: (1) Breaking up the present agrarian organization and the redistribution of the land; (2) the elimination of foreigners from the ownership and exploitation of natural resources and from positions of influence or control, whether political or industrial; (3) the "disestablishment" of the churches and the confiscation of their property; (4) to settle and prevent labor troubles by abolishing peonage and by securing to labor, in the constitution and therefore beyond legislative change, practically all of the concessions and principles which it is striving for in other countries; (5) the encouragement and popularization of education, at least of the primary sort.

The program of agrarian reform, while its general principles are clearly set forth in the constitution, is to be

worked out in detail by the federal and state legislatures in accordance with those principles. As a foundation for the severe limitations which the constitution imposes upon private ownership, it is provided (Article 27) that "the ownership of lands and waters within the limits of the national territory is vested originally in the nation, which has had and has the right to transmit title thereof to private persons, thereby constituting private property." In the nation, it is declared, is vested the direct ownership of all mineral deposits, rock salt and salt lakes, phosphates, solid mineral fuels, petroleum, and all hydrocarbons. Concessions may be granted by the federal government to private persons and to corporations organized under the laws of Mexico to exploit the mineral resources of the country, but only on condition that the work of development shall be regularly carried on and that all provisions of the law shall be obeyed.

With a view to putting an end to the segregation of vast estates in private hands (a system which has caused something very like feudalism to survive in Mexico), it is directed that laws shall be at once enacted for effecting the division of large landed estates. In each state and territory "there shall be fixed the maximum area of land which any one individual or corporation may own. The excess of the area fixed shall be subdivided by the owner within a limited time, and these subdivisions shall be offered for sale on such conditions as the respective governments shall approve. If the owner shall refuse to make the subdivisions this shall be car-

ried out by the local government by means of expropriation proceedings." The compensation to be paid the owner of expropriated property is 110 per cent of its assessed value for taxation, and the increased value of the property by reason of improvements made since the assessment is a matter for expert opinion and judicial determination. In case the subdivisions made by the owner are sold, their value is to be paid in annual instalments sufficient to amortize the principal and interest (not over five per cent) in not less than twenty years, during which time the purchaser may not sell. The owner may be required to receive special bonds to guaranty the payment of the compensation for property expropriated, and the states are authorized to issue bonds to meet their agrarian obligations. The final clause of this article of the constitution is very significant. "All contracts and concessions made by former governments from and after the year 1876, which shall have resulted in the monopoly of lands, waters, and natural resources of the nation by a single individual or corporation, are declared subject to revision, and the executive is authorized to declare those null and void which seriously prejudice the public interest."

"Mexico for the Mexicans" is one of the very emphatically expressed purposes of the new constitution. Hereafter the development and garnering of the enormous natural resources of the country must be in the hands of Mexicans alone. For the conditions under which foreign capital or foreign enterprise might enter for such purposes are so onerous as to be prohibitive. If the

Mexicans have thus condemned themselves to national backwardness and poverty for a century to come, it is perhaps strictly their own affair. But their purpose cannot be mistaken. Article 27 provides that "only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership in lands, waters, and their appurtenances, or to obtain concessions to develop mines, waters, or mineral fuels. The nation may grant the same right to foreigners, provided they agree, before the Department of Foreign Affairs to be considered Mexicans in respect to such property, and accordingly not to invoke the protection of their governments in respect to the same, under penalty, in case of breach, of forfeiture to the nation of property so acquired. Within a zone of 100 kilometers from the frontiers, and of 50 kilometers of the sea coast, no foreigner shall under any conditions acquire direct ownership of lands and waters." It is declared that foreigners shall be entitled to the protection of the Bill of Rights, but there follows this very ominous provision: "The executive shall have the exclusive right to expel from the republic forthwith and without judicial process any foreigner whose presence he may deem inexpedient."

Some of the provisions of this constitution bear with extraordinary severity upon the religious organizations and institutions, and not only upon the Catholic church and its priests, but also upon the foreign missions and mission schools established throughout the country by several Protestant denominations. It would even appear that

foreign colonies in the capital and in some other centers, which have hitherto maintained their own churches, will be compelled to abandon them. It is provided that "only a Mexican by birth may be a minister of any religious creed in Mexico;" that "the law does not recognize the establishment of monastic orders, of whatever denomination or for whatever purpose contemplated;" that "no religious corporation nor minister of any religious creed shall be permitted to establish or direct schools of primary instruction;" that "the law recognizes no corporate existence in the religious associations known as churches;" that "no ministers of religious creeds shall, either in public or private meetings, or in acts of worship or religious propaganda, criticize the fundamental laws of the country, the authorities in particular, or the government in general; they shall have no vote nor be eligible to office, nor shall they be entitled to assemble for political purposes." Very significant also is the provision that "no trial by jury shall ever be granted for the infraction of any of the preceding provisions." The constitution also provides for the confiscation of all church property.

Revolutionary changes are made in the laws governing labor and the conditions under which industrial enterprises, mines, factories, plantations, and railroads may be carried on. An entire reorganization of business may be necessary in order to comply with them. The Bill of Rights declares that a contract for labor shall not be made for a longer term than one year, and the breach of it by the laborer shall

expose him only to civil liability for damages, and in no event shall coercion against his person be employed. The sixth Title of the constitution embraces a complete and drastic labor code, which is to govern "the labor of skilled and unskilled workmen, employees, domestic servants, and artisans, and in general every contract of labor." Eight hours shall be the maximum limit of a day's work for adults, and six hours for children over twelve and under sixteen years of age. The maximum limit of night work is seven hours. The pursuit of unhealthy and dangerous occupations and night work in factories is forbidden to all women and to children under sixteen. Every workman shall enjoy at least one day's rest for every six days' work, and special provision is made for women before and after child-birth. "The minimum wage to be received by a workman shall be that considered sufficient, according to conditions prevailing locally, to satisfy the normal needs of the life of the workman, his education, and his lawful pleasures, considering him as the head of a family." The same compensation is to be paid for the same work without regard to sex or nationality, and the minimum wage is exempt from attachment, set-off, or discount. The determination of its amount is to be made by special commissions to be appointed in each municipality, subject to a Central Board of Conciliation to be established in each state. Wages must be paid in legal currency, and not in merchandise, store-orders, or any other substitute for money. Double wages shall be paid for overtime work, but "in no case shall

the overtime exceed three hours or continue for more than three consecutive days, and no woman of whatever age nor boys under sixteen may engage in overtime work."

The proprietors of agricultural, industrial, mining, and similar works are required to provide comfortable and sanitary dwelling places for their workmen, for which they may charge rent, but not at a higher rate than six per cent a year on the assessed value of the property. They must also establish schools, dispensaries, and other services necessary to the community, and if the population of an industrial center exceeds 200 persons, the employers must set apart not less than 5,000 square meters of land for the establishment of public markets and the construction of buildings designed for "municipal services and places of amusement." Employers are liable to pay an indemnity for all labor accidents and for death or disability resulting from occupational diseases. And it is worthy of remark that, unless laws supplementary to the constitution should so provide, there will be no escape from such liability on the ground of the workman's negligence or assumption of risk, and no plan for a pension or insurance fund to which workmen and the state, as well as the employers, shall contribute, but the entire burden is placed squarely and solely upon the master.

Both workmen and employers are accorded the right to unite for the defense of their respective interests, by forming unions, syndicates, and other associations, and the law recognizes the

right of workmen to strike and of employers to suspend work. Disputes between capital and labor shall be submitted for settlement to a board of conciliation and arbitration, to consist of an equal number of representatives of the workmen and the employers and of one representative of the government. And if an employer shall refuse to submit a dispute to the board or to abide by its decision, he must pay the workman three months' wages in addition to any other liability, while, if the workman rejects the award, "the contract of employment will be held to have terminated." An employer who discharges a workman without proper cause or for having joined a union or for having taken part in a lawful strike, may be required to indemnify him by the payment of three months' wages. Claims of workmen for wages or indemnities accrued during the past year shall be preferred over other claims in bankruptcy or execution proceedings, and debts due from a workman to his employer shall not be satisfied by the taking or withholding of more than one month's wages. No fee shall be charged for finding employment for workingmen by municipal officers, employment bureaus or other public or private agencies. And finally these provisions for the benefit of labor are clinched by a provision declaring that certain kinds of contracts shall be absolutely null and void, including contracts "for an inhuman day's work on account of its notorious excessiveness," agreements for an inadequate rate of wages, contracts for the payment of wages at intervals greater than one week, stipulations involving a direct or indirect ob-

ligation to purchase articles of consumption in specified shops or places, those permitting the retention of wages by way of fines, any waiver of indemnities, and "all other stipulations implying the waiver of some right vested in the workman by labor laws."

The Bill of Rights appears to be the most elaborate, detailed, and specific provision for securing the liberties of the individual that has ever been penned. Many provisions are directly copied from the Constitution of the United States, but usually they are worked out in greater detail and leave less to implication or analogy. But of what value are constitutional guaranties if discretion is granted to the ruler to take them away at will? In the constitution of Mexico we find that ill-omened provision for the "suspension of constitutional guaranties" which is not unfamiliar in the jurisprudence of those countries which have derived their public law to any extent from Spain. The 29th Article is to the effect that, "in cases of invasion, grave disturbance of the public peace, or any other emergency which may place society in grave danger or conflict," the President, with the concurrence of the Council of Ministers and of the Congress if in session, "shall have power to suspend throughout the whole republic or in any portion thereof such rights as shall be a hindrance in meeting the situation promptly and readily."

The nature and fundamental principles of the government established by the constitution of 1917 are set forth in three of its articles (39 to 41) as follows: "The national sovereignty is vested essentially and originally in the

people. All public power emanates from the people and is instituted for their benefit. The people have at all times the inalienable right to alter or modify their form of government. It is the will of the Mexican people to constitute themselves into a democratic, federal, representative republic, consisting of states free and sovereign in all that concerns their internal affairs, but united in a federation according to the principles of this fundamental law. The people exercise their sovereignty through the federal powers in the matters belonging to the union, and through those of the states in the matters relating to the internal administration of the latter. This power shall be exercised in the manner respectively established by the constitutions, both federal and state. The constitutions of the states shall in no case contravene the stipulations of the federal constitution." Another article (115) provides that "the states shall adopt for their internal administration the popular, representative, republican form of government; they shall have as the basis of their territorial division and political and administrative organization the free municipality."

This constitution embraces one feature, having to do with the administration of the national finances, which America might well copy. In view of the wasteful and haphazard way in which appropriations are voted in our Congress, many of our most thoughtful and experienced citizens are advocating the adoption of the budget system. The constitution of Mexico makes it the duty of the national congress to "examine, discuss, and approve the

budget for the next fiscal year, and to lay such taxes as may be necessary to meet the expenditures of the budget." And "no payment shall be made which is not included in the budget or authorized by a law subsequent to the same." Moreover the duty is cast upon Congress "to audit the accounts of the previous year, which shall be submitted to the House of Representatives not later than ten days after the opening of the session. The audit shall not be confined to determining whether the expenditures do or do not conform with the respective items in the budget, but shall comprise an examination of the exactness of and authorization for payments made thereunder and of any liability arising from such payments." And "no other secret items shall be permitted than those which the budget may consider as such; these amounts shall be paid out by the secretaries of executive departments under written orders of the President."

Under this constitution not all "Mexicans" are "Mexican citizens." A "Mexican," aside from those who acquire rights by naturalization, is one born of Mexican parents, or who, having been born in Mexico of foreign parents, shall elect to claim Mexican citizenship on coming of age; and the term also includes "those of mixed Indian and Latin descent who may have established residence in the republic, who shall have manifested their intention to acquire Mexican citizenship." The enumerated duties of Mexicans are to send their children to school until they reach the age of fifteen years, "to attend on such days and at such hours as the town council shall prescribe, to

receive such civic instruction and military training as shall fit them to exercise their civic rights and make them skillful in the handling of arms and familiar with military discipline," to enlist and serve in the national guard, and to pay general and municipal taxes. There are two qualifications which convert a "Mexican" into a "Mexican citizen." First, he must be over twenty-one years of age if unmarried or over eighteen if married; second, he must "have an honest means of livelihood." Clearly this excludes from the privileges of citizenship all professional criminals, bandits, guerillas, as well as the immature and mentally unfit; but it may be a question whether it does not also exclude those who, whether in consequence of age, physical inability, abundant means, or mere idleness, do not actually pursue an "honest means of livelihood." It is the prerogative of a Mexican citizen, as thus defined, to vote at popular elections, and conversely it is his duty to "register in the polls of the municipality, setting forth any property he may own" and his occupation. It is also his privilege to be eligible for any elective office, and it is his correlative duty to fill any office to which he may be elected. Mexican citizens alone have the right to "assemble to discuss the political affairs of the country" and to exercise the right of petition, and they are universally liable to military service and to jury duty.

Provision is made for the division of powers between the executive, legislative, and judicial branches of the government. The President has a limited veto power corresponding almost exactly to that of the President of the

United States. But a very important difference is that the President of Mexico possesses the right of initiative, that is, the right to prepare and introduce bills, which must be at once referred to a committee. He is also required to attend at the opening of the sessions of the Congress and to submit a written report on the state of the nation. And a limitation which seems very curious to American eyes is that "the President shall not make any observations touching the decisions of the Congress or of either house when acting as an electoral body or as a grand jury, nor when the House of Representatives shall declare that there are grounds to impeach any high federal authority for official offenses."

The legislative body consists of a House of Representatives and a Senate. Representatives are elected every two years, on the basis of one for every 60,000 inhabitants. Each senator serves four years, and the membership of the Senate changes, as to half of it, every second year. A provision entirely novel to American ideas with reference to the composition of a legislative body, though familiar enough in connection with the organization of a nominating convention or other political assembly, is that an alternate shall be elected for each Senator and Representative. The possibility of their being necessary to effect the organization of either house is clearly contemplated. It is provided that Congress shall not open a session or proceed to business without a quorum, "but the members present of either house shall meet on the day appointed by law and compel the attendance of

the absentees within the next thirty days, and shall warn them that failure to comply with this provision shall be taken as a refusal of office, and the corresponding alternates shall be summoned forthwith, and shall have a similar period in which to present themselves, and on their failure to do so the seats shall be declared vacant and new elections called."

A feature carried over from the constitution of 1857, but entirely unknown in the American system of government, is the provision for a Permanent Committee of Congress, consisting of 15 Representatives and 14 Senators, to be appointed by their respective houses on the eve of each adjournment, and whose activities are confined to the period of recess. An important duty of this committee comes into play in case of the disability of the President. If this is of a permanent nature and occurs when Congress is not in session, the Permanent Committee is to appoint a President *ad interim*, who shall then call a special session in order that provision may be made for an election. If the disability of the President is only temporary, the committee, in the recess of Congress, is to appoint an acting President, to continue in office during such disability or until it becomes permanent. In addition to this, the committee has power to give its consent to the use of the national guard by the executive authority in certain cases, to administer the oath of office to the President and the judges "on such occasions as the latter officials may happen to be in the City of Mexico," to prepare and make a report of pending matters such as are proper subjects of

legislative consideration, so that they may be acted on at the ensuing session, and to call extraordinary sessions of Congress in certain specified cases.

The President, who is elected by direct popular vote for a term of four years and perpetually ineligible to re-election, must be a Mexican citizen by birth and the son of native-born Mexican parents. He must be over thirty-five years of age at the time of his election, and he must have resided in the country during the entire year prior to his election. He must not be a member of any ecclesiastical order nor a minister of any religious creed. If he belongs to the army or has been a secretary or assistant secretary of any executive department, he must have retired or resigned ninety days before the election, and it is a disqualification if he has "taken part directly or indirectly in any uprising, riot, or military coup." He is not allowed to resign his office except for grave cause, nor to absent himself from the national territory without the permission of Congress. For reasons having to do with the stability of the government, there is to be no vice-president.

An amendment or addition to the constitution may be adopted provided it is agreed to by the Congress by a two-thirds vote of the members present and approved by a majority of the state legislatures. And it is further provided that "this constitution shall not lose its force and vigor even though its observance be interrupted by rebellion. In case, through any public disturbance, a government contrary to the principles which it sanctions be established, its force shall be restored as

soon as the people shall regain their liberty, and those who have participated in the government emanating from the rebellion or have co-operated with it

shall be tried in accordance with its provisions and with the laws arising under it."

Russia's Struggle for Constitutional Government

It was only the denouement of the Russian revolution that was swift and spectacular. The change from autocracy to democracy was but the natural and perhaps inevitable outcome of a long process. It was not so much the creation of a Russian democracy as the emergence of Russian democracy into the light of day. It was the culmination of an evolution the springs of which lie buried in a remote past. It took a foreign war to make it possible; but it became possible in the midst of a foreign war precisely because the Russian army is not now the old standing army, which obeyed the Czar and fired on the people, but a new peasant army, which fraternizes with the workingmen. In reality the Romanoffs were preparing the downfall of their house when (to go no farther back) Alexander II, in 1864, instituted the Zemstvos, intending that they should develop into just what they have become, a training school of local government and of the administration of public affairs, and hence an important agency in preparing the people for constitutional government. Still more was the fall of that house assured when the incipient revolution of 1905 forced Nicholas II to create a legislative body of two chambers, the Imperial Council and the Duma. The latter—the nearest approach which Russia has yet had to a

popular representative assembly—displayed astonishing courage in endeavoring to carry out its progressive program and to secure responsible government, through the years while the autocracy still survived, and it was the firmness of the Duma and the confidence of the people in its leaders which made possible the accomplishment of the revolution without a devastating civil war.

Somewhat to the consternation of the government, the first Duma was flooded with radical and progressive elements, the effective majority being composed of the constitutional democrats, who insisted upon the redemption of all the promises made by the Czar in October of that year, and who came thus to be called the "Octobrist" party. But their efforts were thwarted, and the Czar exercised his reserved power by dissolving the session. The second Duma was convened early in 1907. Though the ruling powers had secured the election of a large proportion of reactionaries, there was still a heavy popular majority, and this session also was dissolved, after stormy conflicts and the arrest and exile of a number of the deputies. Then followed an imperial ukaze, providing an elaborate and very complicated process for the election of the members of the Duma, by which it was assured that

there should be a decided preponderance of representatives from among the land-owners and the wealthy classes, although some principles, resulting practically in minority representation, permitted the return of a few radicals. The third Duma, thus elected and constituted, was naturally content with a *laissez faire* policy, and the period was one of reaction, or at least of a lack of progress. In 1912 the fourth Duma was convened, and it still continues in session. Though it is divided into ten parties, its strength, before the beginning of the war, lay with the conservative Octobrists, but the march of events has so liberalized their program and widened their view that they are now the custodians of the revolution, holding the balance between the fragments of the reactionary forces and the impetuous radicals and socialists.

Early in March of this year the final struggle was precipitated by harsh measures taken by the government to avert a threatened general strike and to prevent demonstrations by the people in the public streets, the popular unrest having been brought to the boiling point by the shortage of food supplies. At the same time the Emperor committed the fatal mistake of issuing his decree suspending the sittings of the Duma. The Duma replied by a unanimous vote that it would not dissolve. Its president, Rodzianko, backed by the Imperial Council, appealed to the Czar to grant the demands of the people. The Emperor, who was with the army at the time, hastily started for the capital. But he was too late. The brief battles had been fought, and the old regime was overthrown. Almost the

only resistance came from the secret police. The army gave in its adherence. So did the university students, the factory workers, the mobs in the streets. The great fortress of Kronstadt joined the revolutionary forces without the firing of a shot. The men of the Volynski regiment shot their officers. Moscow and Odessa sent enthusiastic messages. The ministers of the Crown took refuge in the Admiralty building where they were defended by a few regiments still loyal. But their resistance was overcome, the ministers arrested, and the red flag was hoisted over the building where autocracy had made its last stand.

This forced the abdication of the Czar. He included his son in his renunciation of the throne, and named his brother, the Grand Duke Michael, as his successor. But the latter proclaimed his "firm resolution to accept the supreme power only if this be the will of our great people, who, by a plebiscite organized by their representatives in a constituent assembly, shall establish a form of government and new fundamental laws for the Russian state." Meanwhile, on the initiative of the Duma, a provisional government had been organized, with a new council of ministers, and shortly thereafter it declared its principles, its policy, and its ultimate purpose in an appeal to the people of Russia, of which the following are the most important articles: "An immediate general amnesty for all political and religious offenses. Liberty of speech and of the press; freedom for all alliances, unions, and strikes, with the extension of these liberties to military officials within the

limits admitted by military requirements. The abolition of all social, religious, and national restrictions. The substitution of the police by a national militia, with chiefs to be elected and responsible to the government. Communal elections to be based on universal suffrage. The troops which participated in the revolutionary movement will not be disarmed, but will remain in Petrograd. While maintaining strict military discipline, for troops on active service, it is desirable to abrogate for soldiers all restrictions in the enjoyment of social rights accorded other citizens." In the same proclamation the provisional government announced its purpose "to proceed forthwith to the preparation and convocation of a constitutional assembly, based on universal suffrage, which will establish a governmental regime." Prompt recognition was accorded to the new government by the United States, and the example was followed by Great Britain, France, and Italy. In answer to the address of the American ambassador, Foreign Minister Miliukoff made this significant statement: "I have been more than once in your country and may bear witness that the ideals which are represented by the provisional government are the same as underlie the existence of your own country."

It is a matter of profound concern to all the self-governing peoples of the world that the democratic regime thus inaugurated in Russia should endure, and that the constitutional convention, when it assembles, should give to the people of that vast country a real charter of liberty and free and permanent institutions. A prophecy of suc-

cess in this undertaking must at present be based chiefly on the character of the men who now compose the provisional government, because they are entrusted with the guidance and leadership of the nation; and their influence upon its institutional development must be very great. Fortunately they are men of ability and power, individually competent for their respective tasks, and collectively representative of different schools of political thought and of varying economic and social interests. A competent observer has said: "Nowhere in their country could the Russian people have found better men to lead them out of the darkness of tyranny, men better qualified by loyalty to a cause and by the intelligence and common sense required to bring that cause to success."

The premier and titular head of the provisional government is Prince George Lvoff. Very wealthy and of aristocratic lineage, he was yet forbidden by the Czar, a few years ago, to accept the mayoralty of Moscow because he was too liberal and democratic in his views. In spite of title and riches, he is able to live and move without condescension among the poorest classes and the rudest peasantry. Until recently, he was chiefly known as the very efficient head of the Union of *Zemstvos*, which, working under most discouraging conditions, has accomplished astonishing results in the way of caring for the sick and wounded soldiers and supplying the army with clothing and ammunition. An indefatigable worker, he has displayed remarkable executive ability and a genius for organization, order, and efficiency in administration.

Paul Miliukoff, until lately the Foreign Minister, belongs to the new type of Russian "intellectuals," idealistic but practical, thoughtful but energetic, impetuous but self-controlled. He has been notable as an historian, journalist, and university professor. Years ago he was banished from Russia on account of his expression and teaching of liberal doctrines in the University of Moscow. He visited America and for some time lectured on Russian history and culture at the University of Chicago. Returning to his own country, and still refusing to suppress his political convictions, he was exiled to Siberia for two years, then deported into Bulgaria, and on his crossing the frontier again he was placed under arrest and kept in prison for five months. As a contribution to the beginnings of the present revolution, it was he who denounced and brought about the fall of Stuermer. Since then he has advanced into a position of high leadership and is strong in the confidence and respect of all the people, except perhaps the extreme radicals.

Another conspicuous figure is that of Goutchkoff, the first Minister of War. He is one of the great protagonists of liberal Russia. He was president of the first Duma, one of the organizers of the "Octobrist" party and its leader in the third Duma. He is wealthy and the owner of great estates, but is not for that reason unpopular. He was peculiarly well fitted for the post of Minister of War, because he knows war at first hand, having served with the Boers in the Transvaal and with the Red Cross in Manchuria and the Balkans, and because he has marked

talent for administration and is a high authority upon armament and military law.

Shingareff, the Minister of Agriculture, is probably the most thoroughly well-informed man now living in Russia in regard to the economic and financial condition and needs of the country and its agrarian problems and the vital question of food-supply. In fact, so wide is his knowledge and so notable his ability that he is pronounced by some of the European papers to be the most gifted statesman in Russia.

Rodzianko, the president of the Duma, though not a member of the ministry, is a large land-owner with varied industrial and commercial interests. In politics he is classed as a moderate liberal. His record in the legislative assembly has been one of steady growth in influence and importance, until he has come to be recognized as the leader of the Duma, in fact as well as in name, and as the special champion of the principle of popular representation.

The most striking personality in the provisional government, and perhaps in some ways the most enigmatic, is Kerensky, at first the Minister of Justice and now Minister of War. He is a young and able lawyer, who first came prominently into notice through his brilliant conduct of an investigation into the troubles growing out of a strike, not more than three years ago. He won the confidence and leadership of the workingmen, and was easily elected as a member of the fourth Duma. He is by political conviction a socialist, but is described as a man of

calm temper and level head, and it was not difficult for him to give his adherence to the plans of Miliukoff. His appointment as Minister of Justice did much to bind the socialist-labor party to the new government. Remarkably eloquent, a born leader of men, and by far the most radical member of the cabinet, he is fully able to rally the forces of the radical democracy to the support of the temporary government by playing upon the one point of agreement between the extreme wings, namely, the common determination to prosecute the war to a successful end. He has surged forward into such commanding influence that at the present juncture the fate of Russia appears to rest upon his shoulders.

Are the Russian people capable of forming and maintaining a good system of self-government? Notwithstanding the crushing weight of the autocracy so long endured, it may be said that their situation in this respect is more like that of the American colonists after 1776 than like the situation of the French republicans upon the accomplishment of their revolution. For the Russians have had training and experience in governing themselves. In the first place, the working of the "mir" or village commune has been a school of liberty and practice in the art of government. This ancient institution, for which it is difficult to find any counterpart unless it be the New England town meeting, has had to do with much more than the management of the communal lands. In fact, at various periods in its history, it has exercised control over nearly every interest of the peasant's life, including taxation, military ser-

vice, matters of religion, and the dispensation of justice. Its officers have been elected by universal suffrage, and its functions discharged by the method of direct rather than representative government. Under the Czars, it was continually restricted to an ever narrowing jurisdiction, and its very existence was threatened by the program of agrarian reform inaugurated under the late premier Stolypin, which aimed at abolishing the communal land system and so destroying the original ground for the existence of the mirs. Still they have had their influence, and its character is best attested by the fact that the peasant deputies to the Duma have often shown a surprising aptitude for the business of government.

Of even greater importance, as giving education and practice in governmental administration, are the "zemstvos." These are elective district assemblies, somewhat resembling the English county councils. They are co-operative bodies chosen on the basis of a property qualification, the right to vote for representatives in each district being vested in those owning property to the value of about \$7,500. Originally managing only the agricultural affairs of the district, their duties have been gradually expanded until they embrace matters of education, the relief of the poor, sanitation, local taxation, roads and highways, and almost all the needs and requirements of the district. These local or district zemstvos send their delegates to the provincial zemstvo, which has jurisdiction of practically the same matters, but operates on a much wider scale. Carrying the principle one step further, the All-Russian

Union of Zemstvos was formed, at the beginning of the war, by a national convention of the provincial zemstvos called by Prince Lvoff. This body at first assumed only the task of caring for the sick and wounded soldiers, but its activities were extended until they embraced almost the entire mobilization and administration of the country's resources for the purpose of the war.

Already the provisional government is giving evidence of a spirit which makes for justice as well as democracy. It is impossible to commend too highly its action in restoring to the people of Finland that measure of freedom and self-government which was most unrighteously filched from them by the Czars. In the same direction is the promise of autonomy for Poland. And great satisfaction is expressed with the decree or order removing all restrictions limiting the right of Jews to enter the schools and universities, which is understood to be the first step in the road of giving complete freedom and equal civil rights to that much oppressed people.

But the grave problem has been, and will be, to weld together the different classes of the people and the different schools of political thought in such a manner as to make any form of stable government a possibility. The uncertain and perilous elements in that problem are the socialists and the army. Nowhere else does there seem to be danger of a reaction or counter revolution. The grand dukes and royal princes have formally expressed their "firm resolution to support in every

way the provisional government," and at the same time have surrendered their appanages or holdings of crown lands. The aristocracy and upper middle classes, generally intelligent and well educated, are conservative but not opposed to a republican form of government. The peasants, however, as shown by their representatives in the Duma, are thoroughly radical, and if the constituent assembly shall be chosen by direct and universal suffrage, the peasantry will have an overwhelmingly large vote. The factory and mill workers and the laboring classes generally are deeply permeated with socialism, and it is significant that they accord their leadership not only to the heads of their own unions but also to socialists and radicals trained in the universities. The army—always a tremendous force in a revolution—was at first intensely loyal to the new government and enthusiastic in pledging its support. The popular Minister of War, visiting the front late in March, received an ovation from the soldiers such as to give promise of their unhesitating and undivided allegiance. At first also, the radicals professed to be in harmony with the actual rulers of the country so far as regarded the prosecution of the war and the establishment of a popular form of government.

But later there appears upon the scene a "council of workmen's and soldiers' delegates," representing the socialistic elements in both the labor unions and the army, and hence an extremely powerful and dangerous factor in the situation. This is an entirely voluntary and self-constituted body.

Each regiment or battalion in the army and each factory or mill is entitled to send one delegate to it. Its membership soon reached such proportions that it became entirely unmanageable as a council or convention, and an executive committee was appointed; but it was found that the committee in turn became too large for effective action, having at times as many as 100 members, and eventually an inner council or committee of five was entrusted with the spokesmanship of the entire party. As late as April 17, the council of delegates passed resolutions which were interpreted as meaning that it was thoroughly in harmony with the provisional government. But on the 3d of May, apparently in consequence of a misunderstanding of Miliukoff's note to the allies concerning the prosecution of the war and the object of the Russian government in that relation, there were ominous demonstrations in the streets of Petrograd by soldiers and workmen, particularly against the Foreign Minister, whose resignation was demanded. For a time it seemed as if the entire government might be overthrown. But after extended conferences between the executive committee of the soldiers' and workmen's party and members of the provisional government, the committee announced that no reason was apparent for demanding the resignation of the ministers. On the next day, the purport of the note to the allies having been explained, the "council of workmen's and soldiers' delegates" passed a vote of confidence in the government, but by the very narrow majority of 35 votes in a total of 2,500. It thus be-

came evident that it was necessary to form a coalition cabinet, in order to bind the unstable and threatening elements more firmly to the government by taking some of their representatives into the inner councils and making them carry a share of the responsibility. The ministers issued a declaration frankly stating the necessity for harmonious action and the danger of faction. Kerensky addressed a note to his followers in which he said: "The situation is much more serious on the one hand, and on the other the power of the organized labor democracy has grown. That power no longer has the right to remain aloof from participation in responsibility for the government, when their participation will bring strength to the power born of the revolution. Under these conditions the representatives of the labor democracy must take the burden of power, but only after being formally elected and vested with power by the organizations to which they belong."

In proposing a coalition ministry, the government put the issue squarely before the socialistic elements. For any situation is anomalous in which the actual governing body is supported only by a minority, while the mass of power is against it. It appeared to be not so much a disagreement as to policies or purposes which swayed the socialists away from the government, as a profound distrust, based upon the suspicion that there lingered with the constitutionalists a taint of imperialism. The socialists were very well satisfied with their present position, which involved them in no responsibility whatever and yet enabled them to criticise

and thwart the government and even to impose their will upon it. Probably for this reason, the executive committee decided (May 12) by a vote of 23 to 22 not to participate in the formation of a coalition government.

Events moved rapidly during the following week. On the 14th, Goutchkoff resigned his portfolio as Minister of War. The internal dissensions had paralyzed the arm of government, while the relaxation of discipline had demoralized the army. He declared that existing conditions "threatened the defense, the liberty, and even the existence of Russia," and that he could no longer share the responsibility "for the grave sin being committed against the country." An effort was made to bring the workmen's and soldiers' delegates to a realization of the fate to which their ill-timed and selfish policies were bringing the nation. Strong arguments and representations were given them on behalf of the governments of England, France, and the United States. They were addressed by some of the most popular generals. They were warned that a continuance of their attitude of aloofness would result in the resignation of the entire ministry, and then—anarchy. This was not without effect, for on May 15th, the council issued an appeal to the army, urging a tightening up of discipline, renewed military activity, and a discontinuance of any "fraternizing" with the enemy. Still it was felt necessary to sacrifice any individual whose presence in the government offered any obstacle, real or fancied, to complete harmony between the various wings. And on the next day Miliukoff resigned

and left the cabinet, his place being filled by transferring Tereschtenko from the ministry of finance to that of foreign affairs, and the appointment of Kerensky as Minister of War. Thereupon the executive committee of the workmen's and soldiers' delegates reversed its former action, and voted (41 to 19) to favor the entrance of its representatives into the government. The cabinet prepared a declaration of its policies and of the extensive concessions which it was willing to make to the program of the socialists, and this having been accepted as satisfactory by the latter, the vacant places in the cabinet were filled by the appointment of two socialists, the one to the ministry of agriculture and the other to that of labor. At the time this is written the situation in Russia, though still perilous, seems to contain more elements of promise and less cause for discouragement than at any time during the month of May. Upon the successful formation of the coalition cabinet, Prince Lvoff declared that "the most serious crisis in the modern history of Russia has been satisfactorily settled and conditions already show marked symptoms of improvement. It is my impression that the new coalition cabinet will receive the support of all reasonable Russian citizens. We have for the first time the prospect of a government which will combine both moral and material power."

It is of course impossible to predict when the constitutional convention will be called. On the part of the workers and the soldiers there is a demand for its immediate assembly. The provisional government originally pledged

itself to "proceed forthwith" to the organization and meeting of the convention, and it has lately ordered a series of measures looking to this end. The first meeting of a committee appointed to discuss arrangements for the election of delegates to the convention has been appointed for June 7th. But in the midst of war the task is stupendous and fraught with the gravest dangers. On the one hand, the present ruling group is nothing more than a *de facto* government, to whom no one owes allegiance in any constitutional sense, and which precariously holds together discordant masses by a loose tie. Under such conditions there must necessarily be disorganization, uncertainty of tenure, and chaos always in the background. Yet undoubtedly the principle for the election of delegates to the convention will be universal, direct, and secret suffrage. To carry out such an election (with any intelligent appreciation of the purpose and the issues) among a population of 180,000,000 souls, nearly three-quarters of whom are illiterate, and who are scattered over one-sixth of the earth's surface, to say nothing of collecting the votes of the army at the front and in the trenches, and this in the very climax of the greatest of all wars, seems almost impossible.

Speculation as to the form of government which will be finally adopted is permissible and interesting, but not very profitable as yet. Save in the event of a successful counter revolution, it seems impossible that monarchy should be restored, even in a limited constitutional sense. It is evidently the

wish and intention of all the leaders and of the people generally that the government of Russia should be republican in form, that is, a representative democracy with a legislative assembly or parliament. Reports from Petrograd assert that the American system of government will be taken as a model. But these appear to emanate chiefly from a limited number of American citizens now in Russia who are naturally predisposed in favor of the institutions of the United States. In the absence of more effective influence, it seems much more likely that the new government will resemble that of France more than any other, that is, that executive power will be committed to a president and a cabinet of the French type. The English cabinet, it has been pointed out, is the outgrowth of a party system which would be scarcely workable in Russia, where there are not two parties but at least ten, while the American idea of a cabinet of ministers holding by a fixed tenure and responsible only to the President has found no favor or imitation in Europe. There is also ground for the opinion, said to prevail in official circles, that the desire of the country may prove to be for a form of government more closely resembling that of Switzerland, in which the titular president is really not much more than president of a council of ministers who also constitute a sort of senate or upper house of the legislature. Whatever may be the final determination of the Russian people, it will be a matter of profound interest to all advocates of constitutional government throughout the world.

The Organic Act for Porto Rico

The Act of Congress of March 2, 1917, establishing a new form of civil government for Porto Rico, furnishes some valuable indications as to what a constitutional convention would do, supposing it to be composed of men of the average ability and training of any recent Congress of the United States, if they were given the task of revising the bill of rights of a state constitution. And the first thing that is apparent is that they would make it much more explicit and definite than the first eight amendments to the Federal Constitution. For instance, the Constitution of the United States provides that "excessive bail shall not be required," but the Porto-Rican bill of rights adds to this the clause found in several of the state constitutions, that "all persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." By the federal law, a person accused of crime is entitled to "be informed of the nature and cause of the accusation," but in Porto Rico he is also to "have a copy thereof." Under the national constitution private property is not to be "taken" for public use without just compensation. But there have been many cases in which, without physical expropriation, private property has been seriously impaired in value or utility by the construction of public works, whereby the courts have been forced to establish the doctrine that such injury was equivalent to an actual "taking." But in Porto Rico the provision is that private property shall

not be "taken or damaged" for public use except upon compensation made. To return to the administration of criminal law, the United States Constitution protects the citizen from being, for the same offense, put twice in jeopardy "of life or limb." The phrase is nowadays ambiguous. But it seems to perpetuate the common-law rule, which restricted this protection to cases of crimes of the very highest grade, and in this respect it had to be liberalized by a process of judicial construction. In the Porto-Rican charter, however, it is very sensibly enacted that one shall not be twice put in jeopardy "of punishment." As the machinery of criminal justice in the local courts is not altogether the same as here, the requirement of "presentment or indictment by a grand jury" is changed so that "no person shall be held to answer for a criminal offense without due process of law." In Porto Rico, also, it is explicitly provided that no person shall be imprisoned for debt.

The old fear of the corruption of government officials by sinister foreign influences seems to persist; but whereas the men of 1787 were content to prohibit the acceptance of titles, gifts, or honors from "any king, prince, or foreign state," the men of 1917 are more explicit, and include in the list of forbidden donors "any king, queen, prince, or foreign state, or any officer thereof."

The federal Constitution provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion

the public safety may require it." It has been the understanding of Congress, fortified by at least one decision of the Supreme Court, that the duty and responsibility of deciding when a state of affairs existed to require the suspension of the writ belonged to the legislative branch of government, and not to the executive. President Lincoln, indeed, took this action on his own initiative in the earlier days of the Civil War, but was technically acting beyond his powers until Congress in 1863 expressly gave him authority to suspend the writ "in any case throughout the United States or any part thereof." In view of this, it is a little surprising to find the authors of the Porto Rican constitution providing that, in case of rebellion, insurrection, or invasion, and when required in the interests of the public safety, the writ "may be suspended by the President, or by the governor, whenever during such period the necessity for such suspension shall exist."

This bill of rights also contains some humane and wise provisions on the subject of labor, as, for instance, that "nothing contained in this act shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees," that "eight hours shall constitute a day's work in all cases of employment of laborers and mechanics by and on behalf of the government of the island on public works, except in cases of emergency," and that "the employment of children under the age of fourteen years in any occupation injurious to health or morals or hazard-

ous to life or limb is hereby prohibited."

Considerable attention is given to fiscal affairs, and it is declared that "the rule of taxation in Porto Rico shall be uniform," that "all money derived from any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purpose only, except upon the approval of the President of the United States," and that there shall be no grant of public money or property to any religious institution or priest or minister, nor "for charitable, industrial, educational or benevolent purposes to any person, corporation, or community not under the absolute control of Porto Rico." In this connection we may add that other portions of the act require the governor to submit at the opening of each regular session of the legislature a budget of receipts and expenditures, which shall be the basis of the ensuing biennial appropriation bill, and give to him (what many people would be glad to see incorporated in the national constitution) authority to veto single items in appropriation bills while approving the rest.

The act also contains a stringent "prohibition" clause, although its repeal is permitted at any election within five years after the approval of the act, if petitioned for by ten per cent of the qualified voters of Porto Rico and voted for by a majority of those participating in the election. But the provision furnishes an example of that curious ineptitude in the precise use of language which sometimes appears to overtake legislators. It forbids the

importation, manufacture, and sale of "any intoxicating drink or drug." Intoxicating drinks are clearly those liquids which contain a sufficient percentage of alcohol to produce alcoholic intoxication when used as a beverage. But to define the word "intoxicating" in connection with the word "drug," we shall have to fall back upon its primary meaning, which is simply "poisonous," or capable of generating toxins. Arsenic is an intoxicating drug. Probably Congress meant to forbid the importation and sale of opium and its derivatives. But it would have been easy to say so.

The most important purpose of the act is to confer United States citizenship upon the people of Porto Rico. And it includes in this privilege "all

natives of Porto Rico who were temporarily absent from that island on April 11, 1899, and have since returned and are permanently residing in that island and are not citizens of any foreign country." But these, as well as other inhabitants of the island, are given the privilege of declining United States citizenship and retaining their present political status by making a sworn declaration of their choice before a district court. Children born in Porto Rico of alien parents and permanently residing there may become citizens of the United States by taking the oath of allegiance, within six months after the taking effect of the act if already of full age, or on attaining their majority or within one year afterwards if now minors.

Book Reviews

AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES. By Charles A. Beard, Associate Professor of Politics in Columbia University. New York: The Macmillan Company, 1914. Pp. 330. Price, \$2.25.

Rejecting what he calls the "juristic theory of the origin and nature of the Constitution," and adopting the hypothesis that economic elements are the chief factors in the development of political institutions, Professor Beard here presents a study of the economic forces which conditioned the movement for the formation and adoption of the federal Constitution and determined its most important provisions.

He puts this question: "Suppose that substantially all of the merchants, money lenders, security holders, manufacturers, shippers, capitalists, and financiers and their professional associates are to be found on one side in support of the Constitution, and that substantially all or the major portion of the opposition came from the non-slaveholding farmers and the debtors, would it not be pretty conclusively demonstrated that our fundamental law was not the product of an abstraction known as 'the whole people,' but of a group of economic interests which must have expected beneficial results from its adoption?" If this supposition be correct, he argues, the immediate and guiding purpose of the framers of the Constitution was not the vague

thing known as the general welfare, nor any abstraction called "justice," but the direct impelling motive was the economic advantage which the beneficiaries expected would accrue, to themselves first, from their action. To support his theory as to the cleavage of economic interests which influenced the making of the Constitution, Professor Beard then enters upon a painstakingly minute examination of the facts relating to commerce, industry, and property as they stood at that day. With the utmost care and industry he surveys the economic interests of the country in 1787, and particularly the investments and property holdings of the different members of the constitutional convention. His conclusion is (p. 149) that "the overwhelming majority of members, at least five-sixths, were immediately, directly, and personally interested in the outcome of their labors at Philadelphia, and were to a greater or less extent economic beneficiaries from the adoption of the Constitution." And again (p. 151): "It cannot be said that the members of the convention were disinterested. On the contrary, we are forced to accept the profoundly significant conclusion that they knew through their personal experiences in economic affairs the precise results which the new government that they were setting up was designed to attain." But it is not his purpose to impeach the integrity of the makers of the Constitution. Far from it, he says. The point considered is that they "represented distinct groups whose economic interests they understood and felt in concrete, definite form through their own personal experience

with identical property rights," (p. 73) and that by this knowledge and experience, "as practical men, they were able to build the new government upon the only foundations which could be stable, fundamental economic interests" (p. 151).

Professor Beard's work was undertaken and carried out in perfect sincerity, with scholarly care and thoroughness, with no prejudice or prepossession, with no pet theory to sustain, and with no other motive than to make an important contribution to history. But it unfortunately happens sometimes that the fruits of a pure and abstract scholarship can be seized upon and perverted to an unimagined use, by those who lack both scholarship and the ability to see more than one side of a question. And thus we may find an eminent authority acclaimed (to his discomfort, one may surmise) as the high priest of a cult to which he has no leaning and the preacher of a gospel in which he does not believe. In this way Professor Beard has played into the hands of the socialists. For it is definitely and explicitly upon the authority of this book that a prominent member of the socialist party has entitled his recent book or pamphlet "Our Dishonest Constitution," and in it has described the members of the constitutional convention as "good gamblers" and "a group of grafters."

It is probably quite true that the members of the convention were not mere idealists, nor solely concerned with setting up a perfect frame of government. Economic considerations entered very properly into their deliberations. But their main concern was not

the pitiful desire to protect their private fortunes, but the prosperity of the whole country. Their object, on this side of it, was to free commerce from the shackles imposed by petty state laws, to restore the public credit, and to provide secure guaranties for the property of all their fellow countrymen and all their posterity, not of themselves alone. To insert such guaranties in the Constitution would be a matter of course where every man of energy and enterprise either owned property or expected to. If the Constitution had been framed by the same men, not different in any way except that they had all been poor or possessed of very small estates, can it be supposed that the Constitution would have been essentially different from what it is now? On the other hand, if it had been framed by a group of men composed entirely of debtors or those who owned no property (the second of Professor Beard's economic classes) and if, from their hands, it had emerged with no provisions against paper money or repudiation of debts, and with no guaranties for the protection of property, how long would it have endured, and what would be the present state of the nation? As a consequence of the economic provisions of the Constitution which the framers were concerned about—no matter what degree of concern was born of their own situation as men of substance—all those who have any stake at all in the prosperity of the country or in the preservation from spoliation of the fruits of their labor and industry, are able to sleep in peace at night. And this does not mean the men of great wealth. It means the

thrifty mechanic, the small merchant or manufacturer, the professional man, the educator, the scientist, and the aged and dependent, and the widow and the orphan—in short, those numerous millions of Americans who are free alike from the incubus of extreme poverty and the burden of great wealth, and who constitute the great bulk of our population and the mainstay of our country.

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THE AMERICAN CONSTITUTIONAL SYSTEM. AN INTRODUCTION TO THE STUDY OF THE AMERICAN STATE. By Westel Woodbury Willoughby, Professor of Political Science at the John Hopkins University. New York: The Century Co., 1914.

This interesting and well-written volume, by a distinguished professor of political science, is an examination into the nature of the American system of constitutional government, with special reference to the relations between the Union and the states. It is Dr. Willoughby's thesis that the people really intended, when they voted for the adoption of the federal Constitution, to create a truly "national state," as distinguished from the alliance of states then existing, and yet entertained the logically contradictory idea that it was created by the compact or agreement of the ratifying states. It was therefore impossible for them to do what they supposed they were doing. A national entity, sovereign in its sphere, cannot be brought into being by a contract between sovereign existing states. "If it be admitted that, as a matter of fact, a single sovereign

state has come into being, its conditioning basis must be considered to have been the feeling of national unity that first created it a single political body out of a number of sovereign peoples, and then gave to it an objective organization. The new state cannot, in other words, be held to have derived its sovereignty by grant from the formerly existing sovereignties, nor can such sovereignties be held to continue to exist after the new national sovereignty becomes a fact." Therefore the United States, immediately after the adoption of the Constitution in 1789, was not what it is supposed to be now, nor what the most of the people even then supposed it to be. It was a confederation; it was not a sovereign national state. But it underwent a transformation. Not originally a national entity, it became one. "The circumstance that the Constitution was so indefinitely worded that it could be interpreted as creating a national state, without doing too much violence to the meaning of its terms, enabled the people, through Congress and the Supreme Court, to satisfy their desire for political unity without a resort to open revolutionary means." Yet the means by which this transformation was effected, though peaceable and gradual, were, according to our author, none the less necessarily revolutionary in character. The important influences working to this end were the expansive constructions placed upon the Constitution by Marshall and the other early judges, most of them strongly nationalistic in sentiment, the important acts passed by early congresses in the assumption and exercise of federal power, the exhibi-

tions of federal energy and competence in dealing with such events as the "Whisky Rebellion," the judicial establishment of the supremacy of the Constitution, the general rejection of the Virginia and Kentucky Resolutions, the Louisiana purchase, and the breakdown of the South Carolina doctrine of nullification.

The succeeding chapters of the work, of which a detailed analysis is not here possible for lack of space, are given to a discussion of the relations of the federal and state governments, in respect to such matters as the right of secession, the supremacy of federal over state law (including a passing mention of the question of the power of the United States to fulfill its treaty obligations in the face of opposition from one or more states), the extent of the control which may be exercised by the United States over the forms of government of its constituent units, under the guaranty of republican government, the implied constitutional limitations which prevent either government, federal or state, from affecting the proper autonomy and independence of the other, as, for instance, by the exercise of the power of taxation, the general principles in accordance with which the powers of government are divided between the federal and state governments, and incursions by either upon the rightful domain of the other are prevented, the powers possessed by the general government to compel, in a positive way, the performance by the states of duties laid upon them by the federal Constitution, including the amenability of a state to compulsory process for the enforcement of a judg-

ment rendered against it at the suit of another state, though without mention of the pending controversy between Virginia and West Virginia, which had not become acute when the book was written, and the federal supervision of the states in the performance of their constitutional duties. This is followed by an able discussion of the power of the United States to acquire new territories or dependencies and the mode in which it may be exercised, and of the constitutional status of territories, including the political and civil rights of their inhabitants, in the course of which we find an extended and very interesting analysis of the decisions of the Supreme Court in the so-called "Insular Cases," which required a solution of the question (many will remember how it was phrased at that day) whether "the Constitution follows the flag." The book concludes with chapters on citizenship, the admission of new states, and interstate relations.

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THE AMERICAN PLAN OF GOVERNMENT. The Constitution of the United States as Interpreted by Accepted Authorities. By Charles W. Bacon. New York: G. P. Putnam's Sons, 1916. Pp. 474. Price, \$2.50.

This is an exposition of the Constitution of the United States for the benefit of those readers who are interested in the institutions of their country but are not trained in the science of the law. The method adopted (after an historical introduction relating to the framing of the Constitu-

tion and the events which led up to it) is to set forth the successive clauses of the Constitution, "in a logical rather than a chronological order," following each with a discussion of its scope and meaning as disclosed by opinions of the courts in which it has been construed and applied. The work is thus partly a history and partly a commentary upon the Constitution in the light of its interpretation by the judicial tribunals of the land. It is not a textbook of rules and precedents for practising lawyers. Nor is it meant as an instruction book for law schools. It is, as stated, for the general reader, and it is claimed for it that it "gives the reader the real meaning of the Constitution, a meaning which cannot be obtained by reading the original document, because a collection of rules cannot be understood except by reference to cases in which they have been enforced." Praise must be given to the author for his industry in collecting his authorities and for his evidently careful recurrence to original sources. And it may fairly be said that his work has in general been sufficiently well done, bearing in mind the limited scope and purpose of the book. But it cannot escape notice that a number of errors have been allowed to creep in, which are by no means unimportant, because they are likely to mislead those not thoroughly well versed in constitutional law. For example, the statement on page 19 that "the Sixteenth Amendment permits national taxation of incomes derived from any source, including real estate," ignores the explicit decision of the Supreme Court that the Amendment

was not a grant to Congress of power which it did not previously possess, but was merely the removal of a restriction. On page 43 is to be noted the surprising statement that "the Supreme Court decided that no woman can sit in the House of Representatives." From the author's discussion on page 68, the uninstructed reader might gather the impression that Judge Archbald was the only federal officer against whom impeachment proceedings had even been brought. The statement is not correct (page 178) that "the laws of the United States require judges to issue habeas corpus writs only when constitutional rights have been violated." Not every one can agree with the remark on page 212 that "during the era of railroad building, the rule in the Dartmouth College case became obviously absurd, mischievous, and repugnant to the general spirit of the Constitution." Without further criticism in detail, it must be observed that the treatment of some important subjects is extremely sketchy, as in regard to the power of Congress under the commerce clause and the meaning of "due process of law;" and on the subject of the participation of the Senate in the treaty-making power—carried lately to an extent which many persons regard as a gross usurpation of executive functions—nothing is given but a quotation from the "Federalist." And the author should not escape reproof for having allowed himself at times to lapse into an easy colloquialism which is thoroughly unbecoming his high subject.

THE DEMOCRACY OF THE CONSTITUTION AND OTHER ADDRESSES AND ESSAYS. By Henry Cabot Lodge. New York: Charles Scribner's Sons, 1915. Pp. 297. \$1.50, net.

In this volume, a highly distinguished scholar, historian, and statesman has gathered together some half dozen of his more recent public addresses, certain biographical appreciations of eminent Americans, and three or four delightful essays. The papers relating to public affairs and government exhibit the ripe fruits of long political experience and sound political thinking; the essays, the versatility of a very brilliant intellect, the high culture of a man conversant alike with books and with affairs, and the charm of an essentially poetic temperament. For the closing number, "Diversions of a Convalescent," as a criticism of literature and life, might well have been written by Matthew Arnold himself, save that its grace of diction and imaginative feeling are quite beyond Arnold's range. This REVIEW is naturally more concerned, however, with those parts of the volume in which Senator Lodge arrays himself as the champion and defender of the Constitution. The friends of constitutional democracy will pay tribute to his irresistibly powerful arguments, his skill in attack, as well as in defense, and the learning, sagacity, and good sense which illuminate the vitally important subjects of which he treats. Advocates of the recall of judges, of the initiative and referendum, of "gateway" amendments, and of similarly joyous and irresponsible schemes for wreck-

ing representative government, will take no comfort from this volume. It demolishes their pretensions. It undermines their arguments. It leaves them—had they but grace to see it—in sorry plight. To them, nevertheless, as to all who desire to understand the real meaning of liberty and the cardinal principles which have hitherto sustained our American system of republican government, a perusal of this book, with a serious purpose and an open mind, will prove most instructive and helpful.

The most extended article in the volume, "The Constitution and Its Makers," was an address delivered before a literary and historical society in North Carolina some six years ago. It begins with a comparison between the state of popular feeling towards the Constitution which existed as late as the celebration of its centennial and that feeling of hostility to it and desire of change which is now so frequently and widely manifested. "Instead of the universal chorus of praise and gratitude to the framers of the Constitution," says Senator Lodge, "the air is now rent with harsh voices of criticism and attack, while the vast mass of the American people, still believing in their Constitution and their government, look on and listen, bewildered and confused, dumb thus far from mere surprise, and deafened by the discordant outcry so suddenly raised against that which they have always revered and held in honor." "Beside the question of the maintenance or destruction of the Constitution of the United States," he adds, "all other questions of law and policies sink into utter insignificance."

The article then proceeds to a most interesting study of the men who actually wrote the Constitution and of the great objects they had in view, and an exceedingly able defense of their work, as against the forces which are nowadays seeking, as we have said, to wreck representative government.

Among the other contents of the volume are an address on the Massachusetts "public opinion bill" of 1907, an address at Princeton University on the compulsory initiative and referendum and the recall of judges, a speech delivered as presiding officer of the Republican state convention of Massachusetts in 1912, and an address at the Boston University law school on "The Democracy of Abraham Lincoln," all instructive in substance, sound in thought, and vigorous in expression.

* * *

OPEN-AIR POLITICS AND THE CONVERSION OF GOVERNOR SOOTHEM. By Junius Jay. Boston and New York: Houghton Mifflin Company, 1914. Pp. 236. Price, \$1.25 net.

This is a discussion of the origin and functions of government, the constitution of the state, the legality of anti-social combinations, whether capitalistic or industrial, and the means of making government efficient and of setting right what is wrong in American life and institutions. For the sake of greater interest, it is cast in the form of a narrative or story. But essentially it is a protracted argument between the four chief characters, "General Gore," a knight-errant who believes in military discipline and obedience to orders, the "Reverend Doctor Bod-

ley," an earnest and kindly man who believes in duty, conscience, and loving our neighbors as ourselves, "Governor Soothem," a practical politician who believes in swaying with the winds of popular favor and promoting the interests of his party and himself, and "Professor Lathemwell," a scholar who has done his own keen and vigorous thinking and who believes in a strong and efficient government founded on the duty of the state to the citizen and of the citizen to the state, rather than upon the conquest of either by the other. The discussion takes a wide range and is often highly suggestive, original, and incisive. To instance only a few points, there is valuable material in the argument on the subject of compulsory arbitration of industrial disputes (p. 75), the refutation of the claims of socialism (p. 138), the "Governor's" frankly cynical statement of his reasons for favoring the initiative and referendum (p. 141), the argument that a general strike would be contrary to the spirit of the Constitution and should be dealt with as a kind of civil war (p. 173), and the remarkably informing discussion of the psychology of crowds, beginning on page 175. The climax of the little story, involving the "conversion" of the "Governor" to the "Professor's" view of a sound, strong, and just government, may be left to the discovery of the reader. "Junius Jay" is an assumed name, and it is announced that "so thorough have been the efforts made to conceal the authorship of this remarkable book that the publishers themselves know only that the writer is an American, eminent in public life, and of more than national fame."

Whoever he is, he deserves the thanks of citizens who take an intelligent interest in the maintenance of constitutional government, and who desire that our democracy should be strong as well as just.

* * *

OUR AMERICA. THE ELEMENTS OF CIVICS. By John A. Lapp. Indianapolis: Bobbs-Merrill Company, 1916. Pp. 399.

The author's thesis is that government is not a regimen imposed upon us from without and regardless of our wishes or our acquiescence, but a beneficent agency, growing out of the everyday wants and needs of people living together in civilized society, and intended not only to protect them from harm and make them secure in the enjoyment of their lives and property, but also to provide for them that improvement in the conditions of life, that enlargement of opportunities, and that communal welfare, which cannot be brought to pass by the disconnected efforts of individuals, but only by the exercise of the constraining and prohibitive powers of government. Starting from this point he explains (in simple and direct language illuminated by abundant good sense and practicality) how the various functions of government touch the citizen in his daily life and how they affect his numerous interests, how public officers of many sorts are chosen, how the three great departments of government, the legislative, executive, and judicial, are operated, and how the funds to defray its expenses are raised. Throughout the book, proper care is taken to differentiate the three kinds or sources of government to which the people are subject, national, state, and municipal, and the fields of activity of

each. For, as the author very sensibly observes, if it is the privilege and duty of the citizens to see to it that the things are done for them which they have a right to expect of the government, it is first of all essential that they should know where the power is lodged to effect these objects. Most thoughtful people now believe that the only way to make American democracy efficient is by the universal exercise of the offices of good citizenship. Prerequisite to this is a widespread and thoroughly intelligent understanding of the practical as well as the theoretical side of government. Moreover, it

is a truism that the future of our country and its government is the concern of successive generations, and that those who are now adolescent will soon be called upon to play a part in affairs of world-wide importance. Hence the great value of such books as the one under review. Intended for the use of children in the higher grades of the school system and in the high schools, and furnished with abundant suggestions for discussion and debate, and for wider reading and original investigation, it is a most useful work, and should have a large circulation.



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By THE NATIONAL ASSOCIATION FOR CONSTITUTIONAL GOVERNMENT

The National Association for Constitutional Government was formed for the purpose of preserving the representative institutions established by the founders of the Republic and of maintaining the guarantees embodied in the Constitution of the United States. The specific objects of the Association are:

1. To oppose the tendency towards class legislation, the unnecessary extension of public functions, the costly and dangerous multiplication of public offices, the exploitation of private wealth by political agencies, and its distribution for class or sectional advantage.

2. To condemn the oppression of business enterprise,—the vitalizing energy without which national prosperity is impossible; the introduction into our legal system of ideas which past experience has tested and repudiated, such as the Initiative, the Compulsory Referendum, and the Recall, in place of the constitutional system; the frequent and radical alteration of the fundamental law, especially by mere majorities; and schemes of governmental change in general subversive of our republican form of political organization.

3. To assist in the dissemination of knowledge regarding theories of government and their practical effects; in extending a comprehension of the distinctive principles upon which our political institutions are founded; and in creating a higher type of American patriotism through loyalty to those principles.

4. To study the defects in the administration of law and the means by which social justice and efficiency may be more promptly and certainly realized in harmony with the distinctive principles upon which our government is based.

5. To preserve the integrity and authority of our courts; respect for and obedience to the law, as the only security for life, liberty, and property; and above all, the permanence of the principle that this Republic is "a government of laws and not of men."

Citizenship and The Constitution in Time of War

By Job E. Hedges

Free self-governments are conceived in protest against the tyranny of unjust laws sustained by force, born to the principle that just government rests upon the consent of the governed, and nourished in the spirit of mutual rights and obligations. Their inception, as a rule, is the triumph of freedom of thought over the force which had enthralled it. The particular form of new government thus established depends, therefore, upon the breadth of the original conception, together with the intelligence unselfishly displayed, which effects the reconstruction. Once the new government is formed and has provided through constitutional enactments the methods for its perpetuation, national strength is necessarily the composite of the mentality and morality of the citizenship as an entirety. The fact that a form of free government is established, expressed through the exercise of the franchise and reflected in the making and execution of laws, with their necessary judicial interpretation, does not of itself insure and perpetuate the best results. For this there is also needed a realization of responsibility, attention to civic duty, and a willingness to bear its burdens. The best finished locomotive engine that can be created by the highest type of inventive and constructive genius is useless without the engineer with skilled hand to control its operation. Again, if care is not taken in the selection of the engineer, it matters little how perfect the engine itself may be. It will not only not accomplish the results for which

it was created, but it will soon lose its utility from lack of care or unintelligent use. The instant the public mind takes it for granted that free institutions can be permanent, without the intelligent, persistent, and moral participation of all in the vitalizing of those institutions, that instant the same institutions, like the engine, are subject to decay resulting from the lack of proper care. When the same institutions are utilized for competitive advantage between individuals or groups of men, unless each feels a sense of legal and moral responsibility to all the others, the process of disintegration begins.

No form of government better illustrates these self-evident conclusions than that of the United States. Before our plan was adopted the precedents of history had been studied, the philosophy of government analyzed and re-analyzed, human nature subjected to the acid test of the closest investigation. The fathers of the Constitution then took a clean page, wrote upon it their conceptions of human rights and obligations, and, so far as they could, gave the whole project a providential underwriting, to supplement their own logic and opinions, by declaring that we stand upon the foundation not only of a government by the consent of the governed, but that each human being, with the endowment of life from the hand of God, starts with the inalienable rights of life, liberty, and the pursuit of happiness. The structure of our government, from the national executive,

Congress, and the Supreme Court, down to the most trifling enactment of city or village, is but a part of the means for insuring and carrying out these fundamental principles. The basic assumption must be that each citizen is ready, able, and willing to pass upon any question affecting the general welfare and the perpetuation of our institutions. As a matter of fact he is not. Hence, as the only practicable way to insure adequate expression of opinion, the plan of representation was devised, so that the opinions from the citizen whom we describe as a mere unit should be vocalized and crystallized in the halls of legislation.

But non-attention to civic duty increases the responsibility for good, and likewise the opportunity for evil, on the part of those elected to public office. Hence it happens that most of our substantial reforms consist in undoing what has been done hurriedly and without proper thoughtful investigation. Thus it is that evils happen in our legislation and administration because sufficient care was not taken by way of prevention. In practical result, under our form or any similar form of free government, much that is subject to criticism might be called government by default. Something was done by somebody because some one else, charged with a general duty of citizenship, failed to carry out that general duty on account of personal preoccupation. The supreme test of free representative government lies not in diurnal discussion as to whether the fundamental principles are applicable to present-day problems, or to the in-

tricacy of those problems, but in applying the means already provided to bring about what change may be needed. The serious problem is that of numbers, increasing, between native growth and immigration, to such an extent that it becomes practically impossible to engage the entire public mind in the investigation and solution through law (if that be the remedy) of intricate and novel situations evolving from the complications of commercial and social life. This government has grown beyond the vision and mental reach of the everyday man of affairs. Its extent, its possibilities, its development in wealth through the arts and sciences, its endowment of physical resources,—all these have brought about a situation for the understanding of which rare vision and comprehension are required. And in the realm of local matters, local to the states, from the complicated conditions of urban life, or the apparent cross-purposes of urban and rural life, investigation and discussion in the spirit of deliberation and common moral responsibility become vitally important. But if the competent individual citizen defaults in giving proper time and care to the discussion and solution of questions within the horizon of his intelligence, or to the election of officials to solve the problems beyond his horizon, then we have in fact a government by default.

It is time to discuss the psychology of the American people, in addition to their laws. We have talked and written so much on the subject of our liberties, we have so frequently given ourselves three hearty cheers, that we

forget there is yet something to do. We continue to take our institutions for granted. The doctrine of obedience is theorized upon, but not always practised. Freedom of speech is carried to a point where it is rapidly destroying free institutions. Government in this country is technically officialdom. Practically it is all the people speaking through their representatives, who hold their power of attorney in public office for brief periods. Thus far the facts and the deductions from them are simple and clear. What the effect of the war will be on the mind of the nation, and later on the attitude of our people toward their duties of citizenship, is a serious far-reaching question. The purpose of this article is to use the war as a means of recalling plain situations to the public mind, in the hope that thereby there may result from the war itself a reawakening of a sense of responsibility which will be productive of common good to citizen and nation.

There will be no amendment of the Constitution during the war. The exigencies of the struggle, and of the preparation for it and participation in it, make it necessary to act immediately, leaving questions of constitutionality, for the most part, to be settled later by the courts. Practically, therefore, the question of the hour, so far as academic discussion goes, is a study of the psychology of our citizenship as affected by its environment, and the results to be evidenced in our own affairs when peace is declared. Whatever is written here must be in the nature of an appeal. With keen appreciation of the loss in life and treasure to be incurred, it is certain

that the war will prove of far-reaching result and sentimental value to the nation. It should provoke a closer scrutiny of Constitution, statute, and judicial interpretation. Partial as we are to our form of government, confident as we may be in the strength of its structure, it requires, more than any other existing form of government, a sentimental allegiance, to be evidenced in affirmative upright conduct, as distinguished from merely refraining from the violation of its laws.

Chief Justice Marshall is credited with breathing life into our federal Constitution through the doctrine of implied powers. And that life will preserve the Constitution from foreign or domestic enemies, if our citizens are convinced that the Constitution, with the form of government under it, is worth preserving and that it can be preserved only through consecration of purpose and the protecting care of the individual citizens. As there is a doctrine of implied powers in the Constitution, so also there are implied duties, not expressed in the written instrument or in statute law, but which should be equally compelling upon the citizens. Considered from the broad standpoint of altruistic conduct, even contracts between citizens should have added to them "the party of the third part," including all others outside of those named in the contract itself. Every obligation between individuals, tested by the highest civic duty, should contain nothing which humanly speaking is to the disadvantage of the people generally. The fact that they are not personally represented is not a sufficient answer to the proposition. It would be too much to assume on the

part of human nature, regardless of the question of international law, that our people should not have taken advantage of the necessities of the contending nations in Europe. But the same rule does not apply to our internal affairs now that we are of the Allies. The choice now is between private and public advantage. The fact that the government has been compelled to take over the regulation of the manufacture, and to fix the prices, of materials necessary for the maintenance of the war is a sad commentary on the sentiment of the country. That the government has been compelled to regulate the price of food products to protect itself and the public generally at this time is equally significant. But criticism for the sake of criticism accomplishes nothing. To be effective it must be fair. It would be unjust to expect that with the increased consumption due to the war and the lack of corresponding supplies as a result of inadequate preparation, advantage should not be taken of the situation to some degree, and some profits made other than those normal in times of peace. This is by way of illustration only. But it emphasizes in marked degree the fact that it requires restrictive law even in this free government as a pilot for the ship of state among the shoals of selfishness. Yet it speaks well for the country that, from the time war was declared in Europe until Congress declared that a state of war existed as against us, there has been a slow and rising tide in the public mind, until thinking people are taking control and the others are gradually acceding to it.

We are in the midst of war. The President has read his message to Congress, clearly stating why he asked that a state of war be declared to exist. Following his message came the declaration that a state of war did exist. But following that, came the interminable, inevitable American discussion, largely for the purpose of individual exploitation, as to whether we ought to have done something which we have already done, and on the doing of which depends the great necessary loss of life and treasure. It would seem as if many men were living their lives between hope and regret. By the Constitution and for its preservation every man is dedicated to the extent of his life and means. The declaration of a state of war comes from Congress. Sustenance is voted by Congress and the money supplied by the people. Concentration of authority is natural and necessary. The centralizing of leadership into the fewest hands, and finally in the executive, is plausible, in a measure desirable, and from another standpoint necessary. It signifies of course that the means of government provided by the Constitution, and referring particularly to Congress, have broken down in practice rather than in theory. Leaving for a moment the question of whether any recent national legislation affecting the war is within or beyond the Constitution, if Senators and Representatives believe that in practice the functions of government must be transferred to the President, for the term of the war, why talk about it? Why waste days and months in unavailing discussion of methods of preparation and warfare,

when it is apparent that the intention and possibly the necessity of the case, though after wordy differences, is to turn the whole matter over to the executive? It seems to the writer that the modern tendency is to shirk responsibility and, in the shirking, to blame others.

Not since the Civil War have the American people thought nationally. Campaigns divide, it is true, on national questions, such as the tariff, the currency, commercial combinations, the conflicts of labor and capital, and their collateral subjects. But speaking broadly, the existence of the government as such has not been considered since 1861. Now when the government is threatened, when its very life is in danger, when three years of warfare across the Atlantic have not only revealed Europe to us, but the lurid flames of that conflict have revealed us to ourselves, there is not the grasp and comprehension of the situation generally that there should be, and this defect is not confined to any particular walk of life so far as it may be marked by the opportunities of education or the possession of wealth. The American people will rise to this war; they will continue in it; they will help win it. But the added price they will pay in life and money will be due to the fact that in the midst of our civic existence we have largely overlooked and many have forgotten the existence of a constitution with the obligations which it imposes, obligations that call even for the sacrifice of life. Then when the war comes, not only is the Constitution forgotten, and the ordinary means of governmental existence, with each man in his place

to perform a specific duty, but the responsibility is waived and thrown upon the shoulders of the executive.

It is not the intention of the writer to argue the wisdom or unwisdom of a concentration of authority in the hands of the executive. It is not the purpose of this article to inquire whether the executive is justified in demanding that all the functions of government be placed in his hands. There is no desire to call attention to the fact that the government which calls itself the freest in the world has waived its functions and centered in its titular head a greater authority than that exercised by the head of any other civilized government today. The thought which is sought to be emphasized is that in times of peace our citizens overlook and are negligent of their duties and of their obligations to protect, preserve, and care for the fundamentals embraced within the Constitution. With that before our minds, added emphasis falls upon the fact that in time of war, as contrasted with times of peace, our citizens, speaking by and large, pass beyond the range of indifference, and avoid responsibility as if it were a plague. Having avoided that responsibility and placed it upon the shoulders of another, they seek to criticize the mode of its exercise, thereby rendering its exercise more difficult. In other words, so far as practical experience would demonstrate, in the emergency of war we are forgetting the Constitution. In the necessity of war, we are concentrating the responsibility of authority, and in the pursuit of war we are rendering the exercise of that concentrated responsibility more difficult in the very

hands where we have placed it, by persistent, constant, and useless chatter as to the manner of its exercise. This would justify thinking men, even the average citizens, of other nations in believing that the American people were engaged in a war the reason for which they did not understand and in the development of which they were not participating, except officially.

This condition will change. The American people are slow of initiative. It takes a period of time to get a hundred millions of people under perceptible momentum. If official responsibility has been centered in the executive, there still is left one clear constitutional responsibility, at least by inference if not by direct verbal command, that the government shall have the sentimental allegiance and the physical, mental, moral, and financial support of every citizen. The time has passed for doubt. Every citizen living under our national laws is either for this nation or against it. The person who is not for it is against it. The man or woman who permits a hostile sentiment to be uttered in his or her presence without rebuke approves of that sentiment. There remains, though we are at war, a profound and far-reaching duty of giving moral support as well as formal loyalty to the hands in which we have placed a concentrated authority which we refused to exercise in the manner provided by the law. Let it be remembered that constitutions are destroyed not alone by foreign force but also by domestic neglect. Free institutions are preserved by free men acting as such and believing that freedom is perpetuated by human devotion.

It is frequently asserted, and with truth, that the weakness of democracies or the representative form of government is in the lack of initiative. In familiar phrase, what is every one's business is no one's business. This being accepted, the responsibility becomes greater upon those who have the capacity, the information, and the intelligence necessary for initiative, to take it. Public opinion is quickly aroused in protest. But it is more difficult to arouse it in affirmation, in the launching of a new idea, in the establishment of the necessity of affirmative conduct, as distinguished from the correction of declared abuse. The assertion that every citizen is bound by law to support the government in time of peace and in war would not be denied by anyone. But the tendency is for the application to be made by each one for another and not for himself. This country, by its habit of introspection and self contemplation, due largely to its isolated position geographically, had a well-settled belief that nothing could harm it externally because no one would dare to attempt that harm. As to their internal affairs, our citizens have apparently believed that the country was so great, so firmly established, that it could be carried on indefinitely without individual support. The interpretation of statutes made with reference to the Constitution, the conflict between interests, between labor and capital, the struggles of competition modified by combinations and trusts, have been looked upon as were the games played in the Roman amphitheaters, affecting merely the contestants. Eternal vigilance is still the price of liberty. Yet

we Americans have become so personal in our civic lives that we rally to the support or condemnation of an individual with an alacrity which is strangely missing when it concerns the support or condemnation of a proposition of conduct. All this means that as we increase nationally in resources and almost beyond belief in numbers, each one feels himself lost in the crowd and not exposed to just criticism when he fails to bear his part. The American people, with their quick alert minds, with the variety of conditions under which they live and the constant changes in social and economic conditions due to national growth, crave novelty. To arouse their attention, the temptation is ever present to project the discussion of some novel topic adorned with highly scientific phrases, the danger of which is concealed behind rhetorical flamboyance. The publicist and educator, advancing new theories of government or conduct, usually apply them to others. If applied to themselves, they would be bound by their own logic and therefore compelled to change their habits. The discussion of public questions has developed the phrase-maker, whose scintillations, remarkable and penetrating as they may be, attract the eye for but a moment and then pass into oblivion.

The effort to recall public thought to the foundations on which our government was erected, and to preserve its essential truths as necessary to the continuance of this government, is laudable, essential, and daily gaining in momentum. But hand in hand with this there must go a revival of patri-

otic fervor, as essential as the wording of the Constitution itself. Nothing better illustrates the changed attitude of the public mind on the integrity of the government through its Constitution than the apparent indifference on the part of a portion of our population to their participation in a war which threatens the physical existence of the country in its present form, and the insidious attacks on the Constitution itself from within during recent years. The fact that armed conflict carried on three thousand miles from our own borders, and involving principles inimical to our institutions, failed to call forth individual volunteers, so as to make unnecessary a selective conscriptive draft, should arouse the serious thought of all.

The recent entry of a British army into the city of Bagdad brought vividly to mind the contrast between the modern democratic theory of government and the form of government of the nations of antiquity which occupied the Mesopotamian valley. There the original great nations of the ancient world were founded and flourished to their highest point. Those nations were founded upon the proposition that force was the controlling factor in human life, that only those who could direct force had rights. Whatever enjoyments others had were favors parceled out by force. That doctrine went westward, with decreasing influence as human experience added to knowledge and culture, and refinement and philosophy broadened human vision. It prevailed in Greece, and Greece fell, because a small

minority possessed rights and the remainder enjoyed such favors as were granted them. Rome fell, for the same reason. England took up the struggle for rights as against favors, and the people gained until, through their insistence, many rights were provided by law. There was founded here a newer and broader plan. Freedom was acclaimed the birthright of men. Japan, the hermit nation, opened her doors to the light, and the light inaugurated a change in her institutions. Russian autocracy fell and freedom, though marked by license, took its place. The same idea of freedom, gradually crystallizing into law and order, displays the beneficent effect of example to all quarters of the globe. The British soldiers entering Bagdad marked a new era. Great Britain, a democracy in substance, with a kingship inherited to preserve continuity only, represented the Allies, and there upon the plains of Mesopotamia is exhibited the modern thought in contrast with the wreckage of the ages. The analogy is complete. The struggle of centuries is culminating in the perpetual strife for right as against favor. The tombs of the ancients will prove to be the last resting place of a present monarchy which seeks to renew a condition centuries old, in a modern world conquest, without understanding the humanities of historical evolution.

It is impossible to foretell the effect of the war on forms of government and on the relation of the citizens of each country to the particular form there established. It is certain that there will be radical changes in the smaller European nations, especially

where, for the time being, the old form has been overthrown. Where the present forms of government are largely democratic, the changes will of course be less. One thing may be assumed, that the attitude of the individual citizen towards the form of government to which he bears allegiance will be greatly affected. Even to the unreasoning it must be apparent that, where the suffering has been greatest the changes must correspond. To every human being the thought must come that governmental systems are instruments for human protection and the means to furnish opportunities for normal modes of life. The conclusion will be, even to those who do not attempt to reason logically, that government must in some manner reflect the consent of the governed, even where this doctrine has not hitherto prevailed.

World wars create world sympathies and tend to establish a human brotherhood. All civilization has thought deeply. It will continue to think even more seriously, and when the war closes and reorganization begins, it is natural to assume that, while all will be jealous of their rights and will endeavor to protect them, there will be a broader and more altruistic spirit permeating the regeneration of the world. What we are particularly interested in is the effect it may have on the citizens of the United States, in leading them to review and restudy their own affairs, as theoretically embraced within the words of the Constitution, and the part each citizen must play in carrying out the doctrines on which our government is founded, requiring, as they do in practice, con-

stant attention, personal loyalty in spirit, and unselfishness in conduct. However much the war may have brought about changes in legislation, in the centralizing of authority and the temporary surrender of personal responsibilities, it is vitally necessary in this country that the readjustments of the individual to government and of government to the individual shall be effected in the broadest spirit of patriotism. And patriotism should mean that sentiment which embraces our highest ideals read in the light of mutual service. Rights and obligations will then become properly correlated.

The most difficult problem under a representative democratic government is to determine the will of the people and then to give it official expression. In the beginning of this war only a small minority of our people comprehended the tremendous issues involved. All hoped for peace and that we might not be compelled to enter the war. We know now, what some knew in the beginning, that our participation in it was inevitable. The tide which floated us into the conflict rose gradually. While the arguments for our participation in the war were first grasped by older and reasoning minds, the country at large grew to it through the sentimental enthusiasm of the younger men. In other words, the very patriotic emotions which are logically as pertinent in times of peace as in war were the impelling cause which brought an affirmative response to the declaration of a state of war. The conflict itself will prove a moral purging. Through the smoke of battle will be seen clearly the outline of the Ark

of the Covenant, in the form of the Constitution. There should be a renaissance of the study of its fundamental provisions, a reincarnation of spirit which will guaranty the perpetuity of free institutions for ourselves, as we are now fighting to secure the opportunity for free institutions to others. Armed conflict seems to be the only antidote capable of bringing back to life the sense of moral responsibility, dulled by the enervating potion of indifferentism self-administered through the past years when peace reigned and wealth accumulated.

What will be the effect of the war on the mind of the American public in the future years of peace? How soon and with what measure of friction will the conditions created by the war, and by the return of the army at its close, reach readjustment? Will our people reassume the habits of peace without reference to the classes of service which have arisen in carrying the war to a successful conclusion? Internal problems were threatening and coming to a culmination immediately prior to the war. Will they be taken up in a broader spirit, reflected in the loyalty of each interest to the whole country? Questions were pending of individual rights and obligations, as concerning particular groups of men affiliated by similarity of occupation and social condition. Will they be taken up for discussion and solution in a spirit which shall consider not only those groups, but also their integration as component parts of a general responsibility to government? Will the war have convinced the average citizen of the necessity of service

in times of peace, as the only means of perpetuating a virile democracy whose rights and obligations are expressed in a written instrument? Will the experiences of the war teach us all, with keen sensitiveness, that our future strength and habits depend upon following out, and living up to, and preserving from all attack, those fundamentals of the Constitution which have carried us almost by their own momentum to the present day? Shall we have learned that temporary expedients never solve? Shall we be convinced that personal rights and obligations are best insured and fulfilled through the re-establishment of our fundamental principles, modified in form, but not in substance, to meet the multitude of problems which arise from our complicated life? If these questions and others which will suggest themselves can be brought home

to the mind of every citizen, and impressed upon his heart as requiring the highest conscience and self-sacrifice, with his best judgment, for their solution, our successful future is insured regardless of temporary difficulties. If the war should leave us still thinking, as many did before its inception, with fatalistic belief, that our institutions sustained themselves on account of their innate wisdom, the war will have failed to teach its lesson, and our citizens will have none to blame but themselves. The key that will open the door to permanent prosperity, to spiritual and moral advantage, will be a re-reading of the Constitution, a new dedication to its fundamental principles for the security of life, liberty, and the pursuit of happiness, and a consecrated devotion to the preservation of that trinity of faith by service and prayerful patriotism.

Amendment of Constitutions and Recall of Judicial Decisions

By Ira Jewell Williams
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War has its myriad lessons, not only for the military tactician and the armament specialist, but for the student of statecraft. War brings its tests, as well of the morale and the intellect of the contending nations as of the fabric of their political institutions. While despotisms are supposed to be more efficient in war, and democracies slower to take up the gage of battle, in general it may be affirmed that that nation will do best in peace and in war whose governmental machinery is most sensible and best administered. Midway between despotism and anarchy is our ideal government of well-knit efficiency consistent with individual liberty. The star of free government under fixed fundamental law is in the ascendant. Constitutions originally devised to limit the power of unjust aggression by a tyrannical monarch came to be recognized as essential to curb the excesses of a temporary majority. In the parlance of sport, a constitution may be regarded as containing the "rules of the game." The essential principles of fair play and fundamentals of proper practice can be changed only in their application to future cases.

Those who have read history aright will feel an absorbing interest in the subject of the amendment of constitutions—one of the most tremendous phases of government of the people, by the people, and for the people. In our lucid moments of clear vision, a

congress of a free people in general assembly met is an inspiring spectacle. Under the glass of criticism the component parts may sometimes seem sordid or small. But in the light of history we can see the long upward struggle of the race, the oppression of princes, the sacrifice of patriots. In imagination we live over the hopes and fears of a thousand years. Yes, the legislature of a free people should be an inspiration to national nobility and political purity. Consider, then, the far greater function of the maker and amender of constitutions. He is building for the far future. His work should be a monument more enduring than brass; because a constitution, if limited to its proper sphere of containing the framework of government, should be changed seldom and only with deliberation.

It is a curious fact that England, to whom we are indebted in large part for our instinct and capacity for self-government, entered into the Great War handicapped, among other things, by an unwritten constitution and by a clumsy and antiquated method of "amending" it. Consider the state of affairs shortly prior to the beginning of the war. Two general elections had been held, at enormous expense and loss of time, in the effort to obtain an authoritative "mandate of the country" in affirmance or disaffirmance of the propositions of the government. As a result, while the Liberal coalition

still remained in power, the Conservatives as a party outnumbered the Liberals alone. The exact nature of the mooted points does not now concern us, nor the deep-lying social difficulties, the ever-increasing cost of armament, and the distrust of Germany and her growing power. The purposes of the British government involved a change in the traditional conception of the British constitution. The Lords must "amend or end" was the cry; they must approve the budget, land tax and all. The Commons asserted their sole right to determine matters of revenue, and inveighed against the temerity of the hereditary house in refusing the necessary formality of acquiescence; and the Crown for a time failed, in the absence of an unmistakable mandate from the country, to give guaranties that it would exercise its prerogative by raising a sufficient number of Liberals to peerages to overwhelm the recalcitrant earls. If history was to repeat itself, a temporary *modus vivendi* might be expected to be reached in the shape of a compromise based on expediency and more or less illogical.

The question was of course not whether the Lords were right or wrong in originally rejecting the budget—that could only be determined by a referendum strictly so-called—but rather whether the Lords were to be "reformed," and if so, how. Suppose parliamentary elections resulted in an overwhelming Conservative majority. This would of course be regarded as an indorsement of the correctness of the action of the upper house in this particular case, and in-

ferentially as an approval generally of the exercise of the same right on other occasions. But the decision must be ephemeral and adventitious, depending as it might upon campaign cries and other political issues, and another government could insist upon going to an enlightened country for a contrary mandate within a year or two. The result thus obtained could have none of the elements of permanence, and in every case is easily possible of misconstruction.

But the ambiguity becomes more striking when the returns are such as they were in the ensuing elections in Great Britain. The people had spoken, but it required more than a clairvoyant to interpret their meaning. In addition to real perplexities at home and dangers abroad, the country had reached an almost hopeless *impasse*. Finally, after scenes of unprecedented tumult, the most revolutionary change in the British constitution since the time of William of Orange was effected, and the House of Lords surrendered its rights as an upper house. If passed by the Commons in three successive sessions, any bill may become a law without the assent of the Lords. Money bills do not require their assent, and money bills are deemed such when so certified by the Speaker of the House of Commons. Hereafter the length of Parliament is to be five years instead of seven. These profound changes were not brought about, however, until King George had pledged himself to create new peers if required. The scenes in the Lords when the Prime Minister was attempting to address them sav-

ored strongly of the conduct of the members of the Hungarian Bundesrath.

This change in the British constitution seemed to the Paris "Temps" as great as that which followed the French Revolution. That paper predicted that the great estates of the landed aristocrats would be broken up into small holdings. The labor unions would correct the decisions of the courts, "with no written constitution, as in America, to interpose a barrier to the popular will." The British navy would soon be officered in a democratic sense by "men who rise from the sailor's hammock to the officer's quarter deck." Such at any rate were the prophecies of the Paris critic. And then the English people were again plunged into a crisis over the question of home rule for Ireland, with or without Ulster, concededly a radical and important change in the British constitution, by which it was proposed to expatriate a county of Ireland a majority of whose citizens desired to remain under the rule of the English Parliament. It is said that Prince Lichnowsky, the German Ambassador, reported in May, 1914, that England's quarrels over home rule and Ulster had reached the verge of civil war, that united national action could not be expected, that a cowardly Cabinet had been intimidated by a few militant suffragettes, and that labor was in revolt. And in England there is no organic law which can be appealed to, and no constituted authority except a majority of the Commons acting in supposed obedience to the "mandate of the country" at a general election.

The fundamental difficulties of policy and statecraft will of course remain for solution; but the ultimate power being in the people, the question arises whether the machinery for hearing and recording their voice is in satisfactory working order and of a modern and labor-saving character.

Is not a solution to be found in the adoption of a written constitution, an organic law which can be changed only by the people themselves in the manner prescribed therein, and which will furnish the true and certain chart for the exercise of the powers of government?

It is unnecessary to dwell on the arguments in favor of a written constitution as a means to prevent disputes as to the scope of various governmental functions, to promote stability and certainty of law and its administration, and to restrain the excesses of a temporary majority. But the spectacle across the water has a peculiar significance and an engrossing interest to the student of constitutional law. It suggests the underlying distinctions between a so-called unwritten constitution (which from our American point of view seems hardly a constitution at all) and a fundamental law carefully crystallized in writing, containing the general scheme of government and the limitations prescribed for its various departments and agencies. It throws into sharp relief the contrast between the methods of amendment of unwritten and written constitutions. In these times, when everything is on trial and when the old land-marks, it seems, must show cause why they should continue, it may be permitted to

ask which system has the advantage in this matter of amendments. And is there any basis for the alleged necessity for a method of more speedy amendment of our own written Constitution?

In passing, it may be well to observe briefly the salient features of the British constitution, considered as a type of unwritten organic laws, and then to consider the various written constitutions of the world with the provisions for their amendment. What is the nature of the British constitution and what are its limits? This inquiry may be succinctly answered by the following extracts from Judge Hare's treatise on "American Constitutional Law" (pages 167-215): "If the English government as originally constituted was limited in its several parts, it was and still is absolute as a whole, or restrained only by public opinion and the fear of provoking popular resistance. There is no change in the established order of things, no suppression of chartered or prescriptive right, that would not, if declared by Parliament, be legally binding on the English people. The House of Commons has by slow degrees dispossessed the Crown and peerage, and is now the propelling and guiding force, the sails and helm of the English government. Raised from a subordinate position to be the hinge on which all else depends, it controls the House of Lords, selects the ministers, and wields through them the power of the throne. The executive has in this way become the mouth-piece of the legislature; and if the independence of the judiciary is secure, the safeguard is in public sentiment

and not in constitutional provisions. All depends upon the House of Commons, upon their ability to conduct the business of the state properly; all depends upon their being able and willing to keep the ministers of the Crown within bounds, and to fulfill their duties to the state. They are simply an elective assembly, and in that elective assembly all the powers of the state are really gathered up and are centered in it. The answer is that if the only limit to the authority of Parliament is that set by the reason and judgment of the Lords and Commons, they still proceed according to rules and precedents, which, having been handed down for ages, possess a restraining influence which written constitutions sometimes want. If a single and uneducated class should at any future period predominate, and, ignoring that tradition by which Parliament has so long been influenced, decide every question as it arises according to the passions and impulses of the hour, the want of restraining influence of a written constitution may be severely felt, and the people of the United States have an additional reason for adhering to the method chosen by their forefathers."

Let us turn now to some of the written constitutions of the world and the methods by which they may be amended. The Constitution of the United States and the constitution of every state of the Union contains a provision with regard to amendments. The fifth article of the Constitution of the United States provides that two-thirds of both houses of Congress may propose amendments or the legisla-

tures of two-thirds of the several states may call a convention for proposing amendments, which shall be regarded as valid when ratified by the legislatures of three-fourths of the several states or by conventions in a like proportion thereof, as one or the other mode of ratification may be proposed by Congress. Provisions for the calling of a constitutional convention are found in the constitutions of all the states except eleven, namely, Connecticut, Indiana, Louisiana, Maine, New Jersey, North Dakota, Oregon, Pennsylvania, Rhode Island, Texas, and Vermont. In most of the states, an amendment to the constitution is first passed by the legislature and then returned for the approval of all the qualified electors. In many of the states, a certain proportion of the legislature may revise the constitution by voting for a convention to consider different proposed amendments, and the advisability of such a convention is submitted to the vote of the people for final decision. Pennsylvania may stand as a type expressing the belief of the makers of constitutions that changes should not be made according to "the passions and impulses of the hour," but thoughtfully, carefully, deliberately, advisedly. A proposed amendment must be passed by two successive general assemblies, and must then, after repeated advertisement, be submitted to a vote of the people.

Turning to the constitutions of the other nations that have definitely formulated in written documents the essentials of government and prescribed the machinery for changing them, we find that in *Argentina*

amendments to the amended constitution, adopted September 25, 1860, may be proposed by a two-thirds vote of Congress and ratified by a convention. In *Australia*, the amended constitution which passed the British Parliament and received the royal assent on July 9, 1900, may be amended on the proposal of both houses and thereafter on approval in each state by the electors thereof, or either house may propose an amendment and the Governor General may submit the same to the electors. In *Austria*, the fundamental law concerning the general rights of citizens, enacted into constitutional form December 21, 1861, and since then modified in important particulars with regard to the suffrage qualifications, may be amended as to the general rights of Austrian citizens, the establishment of the imperial court, the judicial power, and the exercise of administrative and executive power, only by a two-thirds majority of the members present in the House of Representatives of the Reichsrat, not less than half the members of the house being present. In *Belgium*, the constitution adopted February 7, 1831, may be revised, according to article 131 thereof, by a declaration of the legislative power, which *ipso facto* dissolves the two houses. Two new houses are then summoned, which, with the approval of the King, shall then act upon the points submitted for revision. In *Brazil*, article 90 of the constitution adopted February 24, 1891, provides that amendments may be proposed by one-fourth of the members of either house and accepted, after three discussions, by two-thirds of

the votes in both houses, or, when suggested by two-thirds of the states in the course of one year, the proposed amendment may be adopted in the following year after three discussions, by a two-thirds majority of both houses. The constitution of *Chile*, originally adopted May 25, 1833, which remained unchanged until 1871, received numerous amendments from that time to 1893, in the direction of a liberalizing of the national institutions. By article 156, an amendment is proposed by either house, upon the motion of a member or by a message from the President. Upon the approval of the proposed amendment by two-thirds of both houses it is sent to the President, whose sole power consists in the proposal of modifications or corrections. The amendments as finally agreed upon are submitted to the ratification of the Congress chosen or renewed immediately after the publication of the proposal of amendment, and after approval are thereupon transmitted to the President for promulgation. In *Denmark*, the constitution revised July 28, 1866, provides that amendments may be proposed by the Rigsdag, and if they are adopted, the Rigsdag is dissolved and a general election is held for the Folksting and Landssting. The amendment must be approved by the newly elected Rigsdag and the King. The constitution of *France*, adopted February 25, 1875, may be amended, according to article 8 thereof, by a resolution of either house concurred in by the other. The Chamber of Deputies and the Senate then meet together in National Assembly, and the acts effecting revision of the constitutional laws must be passed by

an absolute majority of the members composing the National Assembly. The constitution of the *German Empire*, adopted April 16, 1871, and since amended ten times, provides by the 8th article that amendments may be made by legislative enactment, but shall be considered as rejected when fourteen votes are cast against them in the Bundesrath, in which at present there are fifty-eight members. But provisions affecting certain rights of particular states may be amended only with the consent of those states. The constitution of *Japan*, adopted February 11, 1889, provides in article 73 that a project to the effect that an amendment is necessary shall be submitted to the Imperial Diet by imperial order, two-thirds of the members being present, and no amendment shall be passed unless a majority of not less than two-thirds of the members present is obtained. The constitution of *Mexico*, in effect May 1, 1917, permits amendments by a vote of two-thirds of the members present in the Congress of the Union and the approval by a majority of the legislatures of the states. The constitution of the *Netherlands*, as revised November 6, 1887, may be amended by the promulgation of a law, the dissolution of the upper and lower houses of the States General, and a two-thirds vote in the new houses. In *Norway*, under the constitution adopted November 4, 1814, a proposed amendment is presented at one of the regular sessions of the Storting and published in the press. After the next election, the new Storting may by a two-thirds vote adopt or reject the proposed change, but such amendments shall not contravene the principles of

the constitution. The recently adopted constitution of the *Portuguese Republic* provides that it shall be revised every ten years, "and for this purpose the congress whose mandate covers the epoch of revision shall have the necessary powers." By a two-thirds vote of Congress, both chambers meeting in joint session, revision can be advanced five years. The proposal for constitutional revision must clearly define the projected alteration and no proposal will be considered the intent of which is to abolish the republican form of government. The constitution of *Sweden*, adopted June 6, 1809, and amended in 1866, may be amended by the Riksdag in concert with the King, who in turn consults the Council of State. The constitution of *Switzerland*, adopted April 19, 1874, may be amended by the agreement of both councils of the Federal Assembly. Or when 50,000 Swiss voters demand a total revision, the question whether the constitution ought to be revised shall be submitted to the vote of the Swiss people.

Each of these governments has recognized the desirability of written constitutions and inserted therein specific provisions for making needed changes and improvements.

Which is better, a written constitution or the so-called "unwritten" constitutions, of which the British by-laws annexed from time to time to Magna Charta may stand as the prototype? Which has the advantage in amendment? Are there respects in which our constitutions have too little resilience and "give"? Is it desirable for us to provide a swifter method of

specific amendment by adopting the "recall of judicial decisions" on constitutional questions?

Our forefathers in their wisdom sought more definite guarantees and surer sureties for their dearly-bought liberty by embodying in the organic law as well those fundamentals of right and justice which have been for centuries the boast of English jurisprudence as those more recently expounded principles of human rights and property rights. To these were added in anxious care not only definite limitations upon the power of the central government, but careful prescription of the manner of the exercise of those powers. This tendency to amplify the organic law by including details of administration was emphasized and extended in the state constitutions as they were from time to time adopted and revised. This tendency was perhaps more natural and more pardonable in a constitution creating a government of delegated powers, a national sovereignty not supreme in matters of local concern, than in the constitutions of the states themselves. The state constitutions grew to great bulk. The Twelve Tables of the Law expanded into a Thousand-and-One Thou-Shalt-Nots, many of them as mystic, if not as fascinating, as the original Arabian Nights themselves. Now that all manners, customs, and laws stand indicted at the bar of public opinion and must stand trial for their lives, a suggestion may be ventured that some of the local manifestations of a world-wide unrest may be due in part to our past jealousy and fear of our agencies of government.

It is difficult to imagine any sound argument against the superiority of what may be called, for convenience, the "American system" of constitutional amendment. Its results are certain, as against the often sphinxlike or Delphic character of the British popular mandate, and possess an element approaching finality, whereas a single British election may be deemed to have changed the British constitution; and the fact that, under our system, it requires a period of perhaps from four to six years in order to adopt an amendment gives an added respect for the fundamental law and tends to prevent any changes therein except after opportunity for full and repeated discussion and careful and sober reflection. It is just here that some impatient souls, burning brightly with zeal for humanity, have found a fancied basis for criticism, declaring that the processes of the Constitution are too slow to keep pace with the rapid strides of changing economic theory and social consciousness. It may be insisted by such as these that while Great Britain may learn from other nations the wisdom of a written fundamental law, with provisions therein as to the manner in which that law may be changed, we on our part may learn from our British cousins the desirability of being able to correct speedily any crying abuse. Let us examine the proposition with respect and care. Briefly stated, it is this: The recall by popular vote of judicial decisions sustaining the organic law in which the people have reserved to themselves and against their agencies, either legislative or executive, certain fundamental rights which the majority have

solemnly covenanted at all times to respect. This is the new method proposed of piecemeal and partial readjustment of constitutional inhibitions by a vote of the people that, notwithstanding the broad general language of the instrument, the particular act of legislation shall be held not to infringe the organic law. Is there an evil to be cured? Is the remedy sound? Is the proposal wise?

Is not the evil more fancied than real? Where are the statutes which enlightened public opinion would have sustained as within the power of the legislature, to which the courts, under their sworn duty to uphold the constitution, have refused to give effect? Search the decisions of the last five years of the state of Pennsylvania (a typical industrial commonwealth) and you will find thirty Acts of Assembly attacked on the ground that they infringe some provision of the Constitution of Pennsylvania or of the United States. Twenty-three of these acts were upheld, under the conservative rule of comity long ago adopted by the courts, that an Act of Assembly shall not be declared void unless it violates the Constitution so clearly and palpably as to leave no doubt in the mind of the court. Of the remaining seven acts, four were declared unconstitutional on the ground that they were local or special laws, one because it was defective in its title, and the other two because they violated specific provisions of the Constitution. Of the seven cases mentioned but one can be said to relate to public policy or the police power, and it is to such acts alone that the present proposal applies. That was an act making eight

hours a day's labor on public works, which was held to be in violation of a provision of the Constitution of Pennsylvania that the legislature shall not pass "any local or special law regulating labor, trade, mining, or manufacturing." The opinion of the court in the case is the best possible vindication of the correctness of the decision. It was said: "Notwithstanding the act embraces all of a particular class, yet if the subject is one not within the purposes of classification, the law is special. The purpose and subject of the act under consideration are both clearly expressed in the title, which reads, 'An act to regulate the hours of mechanics, workingmen, and laborers in the employ of the state or municipal corporations therein, or otherwise engaged on public work.' The basis of all classification is a difference in conditions. When difference in conditions exists to an extent that certain political subdivisions would be oppressed by general laws required for the welfare or convenience of certain other subdivisions, classifications may be resorted to, to provide proper legislation for each. When no such difference exists, classification is never allowed. It is impossible to suggest a difference between municipal corporations and private corporations that would make regulation as to the number of hours to be employed in a day suitable for one class, but unsuitable for the other. There is no pretense that there is any such difference. So far as labor is concerned, no more is involved in the construction of public works than in private enterprises of like character. The classification here attempted is not with a view to meet

the wants of municipal corporations as distinguished from other corporations, but to ameliorate labor conditions, and it rests on neither distinction nor difference. As well attempt to classify for labor regulations corporations according to their capital stock, and impose the regulations upon those only whose capitalization brings them within the designated class. Following our own adjudications, too explicit to be mistaken, it results necessarily that the act under consideration offends against the seventh section of article III of the Constitution, which forbids special legislation regulating labor. If this were an attempt by general law to regulate the hours of labor throughout the state, the argument in support of the act based on legislative exercises of police power would call for consideration; but as the case stands, discussion of this larger question would be wholly irrelevant. We rest our decision on the conclusion reached, that the act transcends the power of the legislature, in that it is special with regard to a subject which can only be legislated upon by general law." (*Commonwealth vs. Casey*, 231 Pa., 179.)

It is not necessary to defend the wisdom of the framers of the Pennsylvania Constitution of 1874, and of that sweeping clause in it which was meant to strike down the great evil which had resulted from the mass of special and local laws. If labor is to be regulated by local or special laws, let us by all means go to it in an open and aboveboard manner and prepare to amend the Constitution by striking out the clauses which the wisdom of today may show to have been outlived. Such

a course would lead to full discussion of the merits of the general proposition. But let us not fritter away any valuable constitutional guarantees by a popular vote as to whether a particular act with regard to labor or any other question of public policy shall be made an exception to the general rules laid down in the fundamental law. Let us if necessary change the rules of the game, not vote to suspend them in particular cases or classes of cases. Equality before the law can be secured only by the application to all cases of certain fundamental principles, and failure to apply these fundamental principles in any given case cannot be justified by any popular vote, no matter how enormous may be the majority. If an act were passed that general reputation should be evidence against a defendant accused of being a monopoly, or an attorney of being a corporation lawyer, or a labor union accused of dynamiting, are we willing to concede the wisdom of submitting to popular vote the question as to whether due process of law should be set at naught in that particular class of cases?

A curious feature of the recall or limitation by popular votes of constitutional safeguards is the fact that the proposers of the plan have not had the temerity to extend it to the decisions of the Supreme Court of the United States. What logical basis can be advanced for such a distinction may be left to the imagination. In the last five years that tribunal has decided 82 cases on constitutional law. In 68 cases the statute attacked was upheld, and in only 14 cases was the decision

adverse to its constitutionality. In each of these fourteen cases in which, within the last five years, acts of state legislatures or of Congress have been held by the United States Supreme Court to be unconstitutional, the decision justifies itself both at first blush and after careful reflection. Six of the fourteen cases represent attempts to levy unconstitutional taxes, by taxing the privilege of carrying on interstate commerce business, by taxing business and property used or located outside the state, or by impairing contractual obligations established by a previous and existing act. In the remaining cases, the police power was used unconstitutionally to take private property for the convenience of others, not for the public welfare, or to take it without due process of law, or an act provided for involuntary servitude contrary to the Constitution. (The decisions in these fourteen cases may be seen in the following volumes of the United States Supreme Court Reports: Vol. 215, pages 170 and 417; Vol. 216, pages 1 and 400; Vol. 217, page 196; Vol. 219, page 219; Vol. 223, page 298; Vol. 224, page 354; Vol. 226, pages 137, 205, and 405.)

It is stated by a well-known and authoritative exponent of the recall of constitutional safeguards that it is to be the court, and not the people at the special election, who are to decide whether the particular statute involves a question of public policy or is within the police power of the state. I pause to suggest the dilemma that if the court decides that the act is within the police power, no reference to the people will be needed, and if it decides that it is

not within the police power, there can be no reference to the people, because only such questions can be referred as the court decides to be within the police power. But let me question the logic of a system which holds that a tribunal is good enough to decide whether a question is a question of public policy or police power, and yet may not be trusted to decide correctly the main question itself.

I do not blink the point that questions do arise in the interpretation of constitutions which are in their nature economic. I merely suggest that such cases have been exaggerated both as to their number and importance. Read over the list of decisions of the Supreme Court of the United States, or of the supreme courts of any of the great industrial commonwealths and point me out the decisions which, as lawyers or as men more or less versed in economics, you do not regard as sound. At the most, there may be one or two about which we may be permitted to doubt. But you will perhaps be as likely to differ with the Supreme Court of the United States as with the Supreme Court of Pennsylvania or with the Court of Errors and Appeals of New York. You may find cases in which the court upheld the act as against the constitution, where you would have upheld the constitution as against the act. But it was the Supreme Court of the United States, and not the Court of Errors and Appeals of New York, that held the "Bake-Shop Act" against the employment of bakers for more than ten hours a day to be unconstitutional. Much criticism has been levelled at the Court of Er-

rors and Appeals of New York in another case because, having decided under a given state of facts that the constitution of that state meant a certain thing, it refused to follow a subsequent decision of the Supreme Court of the United States that the same words in the federal constitution did not mean that thing. The judges of the Court of Appeals were sworn to support the constitution of their state as they understood it, and a lawyer can fully appreciate the force of the principle of *stare decisis* which might lead that court to adhere to its former decision as to the meaning of the state constitution. But the fact is that the statute under consideration, the New York "Workmen's Compensation Act" and the act of Congress differed radically in substantial respects. Instead of abusing courts, which, with the purest motives and the greatest intellectual skill, are endeavoring to solve correctly most difficult problems, it behooves the publicists to find some possible remedy other than mere criticism. In order to attain uniformity throughout the entire country, an amendment to the Constitution of the United States is called for, permitting appeals to the Supreme Court of the United States whenever the meaning of the federal constitution is drawn in question in a case, and not merely (as now) when the decision is against the federal right claimed. The resultant crowding of the dockets of the court could be taken care of by the creation of a Patent Court of Appeals and other special appellate tribunals, and in order to avoid the embarrassing situation that the same words in the federal

constitution may mean one thing and in the state constitution another, a provision could be inserted in the constitution of each state making final and binding upon the supreme court of the state the decisions of the Supreme Court of the United States upon identically the same clauses of the constitutions.

Once concede that the evil resulting from the possibility of incorrect or over-conservative judicial decisions on constitutional questions is greatly exaggerated, and the remaining queries as to the wisdom of the proposed change seem to answer themselves. Some of the advocates of the scheme deprecate the phrase "recall of judicial decisions." They prefer to regard the plan as a kind of referendum, the question submitted to the people being whether, notwithstanding the general phraseology of the constitution which the statute concededly violates, such statute shall be considered as excepted out of the fundamental law. It is contended that it is the part of wisdom to do this rather than to change the wording of the constitution itself, thereby opening the door to the possibility of other legislation which may be undesirable. In this light, it is a proposal of the most iconoclastic nature to change the principles of our government. It would substitute for the "known certainty" of the fundamental law, which is the safety of all, and which was intended to be the everlasting bulwark against the oppressions and exactions of a temporary majority, the combination of a written constitution with a provision for carving exceptions out of it by a mere temporary popular vote, which exceptions,

so far as we know, must stand until there is a general constitutional convention, or, if there be machinery provided for reconsideration, until a mere temporary popular vote can be had the other way.

In Great Britain, such a referendum would be an immense improvement in place of the present cumbersome charter of the people's liberties. For us, it would be a step backward and would create an anomalous system, a state of affairs in which no man could rest secure in the permanence of any part of the organic law.

Phrase it how they will, the proposition in its last analysis is really for the recall of judicial decisions. The written constitution is the fundamental law. The judges, under their oath to support that constitution, decide that by its express language the people have denied to their representatives in general assembly met the power to pass a certain act. Those whose interests are affected say, "We will appeal to the country to say whether, notwithstanding the decision of the courts, the act shall stand." To the popular mind, this means nothing more or less than the vote of the people reversing the decision of the court. If the act is validated by the election, then it was valid *ab initio* and the rights of the parties in the particular litigation must be adjudicated in accordance therewith. Scholastic refinement may point to a distinction between such a process and the recall of judicial decisions, but the people as a body will never see it in any other light than that they by their votes have set at naught the decisions of the judges. Can this be done without

weakening in the popular mind that respect for the courts which is essential to the permanence of our institutions? Will not the allegiance properly due to government be shaken when every citizen is permitted at the polls to express his opinion, so regarded in his eyes, as to whether or not the court was right?

Let us see whether "recall of judicial decisions" is not the right terminology. Suppose the court says the act is void, and the people say it shall stand, but the parties to the suit say: "The rights which we assert are protected by the federal as well as the state constitution, and if the decision of the state supreme court is reversed by the people of the state, we have the right to have the question reviewed by the Supreme Court of the United States, for the federal right would be denied us if the verdict of the people of the single state should be allowed to stand." We shall then have the additional anomaly of an appeal to the Supreme Court of the United States from the popular vote of the people of a single state, which vote reversed the decision of the highest tribunal of that state. It has been suggested, perhaps sardonically, that such a popular vote would be "helpful" to the Supreme Court of the United States in reaching a right conclusion. Is it conceivable that a referendum of the voters of California as to the right of Japanese to citizenship would be "helpful" to the Supreme Court, should the question come before that tribunal? How a close popular vote, or any other vote in a single state, as to whether an act should be excepted out of the general language of their state constitu-

tion could be regarded as enlightening to the United States Supreme Court in deciding the meaning of the language of the federal constitution can only be apparent to those suffering from a pronounced confusion of ideas. The law's delays have long been the subject of adverse comment. Fancy the celerity with which the determination of the constitutionality of a particular statute will drag its way through the Alice-in-Wonderland maze of an appeal from the courts to the people of the state and from the people of the state to the court of the nation!

In the wise distribution of the powers of government, the courts have been regarded as law-givers in the sense that they finally determine what is the law in its application to the facts of a particular case. Respect for law is in large part respect for courts and their decisions. In all the spirit of iconoclasm which is abroad in the land, is there anyone who will contend that it will be for the common weal to decrease the respect for and obedience to law?

It is impossible to dwell upon all the practical difficulties which suggest themselves. The act is upheld by a popular vote. That merely gives the people's "O. K." to that act. Every amendment of it must again run the gauntlet through the courts and before the people. Few acts spring full armed from the legislature. Most of them require amendment in order to be effective. Yet in the case of every amendment of an act on the borderland, which has been outlawed by the courts and adopted by the people, there must be another popular election held as to whether the amendment shall

stand. In comparison with such a congeries of difficulties, the present method of constitutional amendment by express change of the language of the instrument is simple and easy. The new proposition not only violates our constitutional traditions, but shocks our notions as to the fundamental nature of a constitution, the permanent, deliberately adopted rules of the governmental game, state or national, which the majority may not transgress. Viewed in this light, an exception to the general wording of the constitution by permitting a certain act to stand, notwithstanding it is in violation of the principles of fairness and justice as laid down in the organic law, is subversive of our conceptions of law itself.

Is it incumbent in discussing what really relates to written constitutions, their superiority, and the method of amending them, to acquiesce in the platitude that changes must and should come? If so, let us adopt as our own the eloquent words of the preacher: "All that we see is in flux. Every institution, opinion, government, fashion, is a peddler with his pack, passing by on the road and over the hills and out of sight. Nothing stays long, and if it overstays its time is admonished. Hence no forms, methods, opinions, thus far, have escaped modification. Our world is not an inorganic mineral, but a prolific seed, putting forth eyes and buds, and coming evermore to the blossom. So that, while everything is good in its season, nothing is good permanently, and God does not intend the best, thus far, to last. Consequently the right view of the world is that of a temporary stag-

ing, a wayside inn, where one makes shift to spend the night." All thinking men must concede the necessity for change, but should equally concede the undesirability of change merely for change's sake. With all our worldly wisdom and achievement and our fancied superiority to the past, we have come but a little way along the path of time and we shall never go so far as to leave behind us certain essential principles which should be the guiding stars of state and national life.

Perhaps the proposal for the recall of judicial decisions would not be worth our while to consider seriously if we could depend upon the continuance of the proper attitude on the part of the people generally toward our Constitution. That sacred document is to be held by us not as the last entrenchment of privilege, not as the unfeeling barrier to human progress and attainment, as Demos more than hints, but as the crystallization of the experience and wisdom of our devoted forefathers, the solemn covenant of the majority with the minority, the charter of the liberties of every citizen. The gospel of a government of laws, not men; of definite limitations of the powers of co-ordinate branches of government; of constitutional restraints and safeguards which cannot be changed by a mere election, but which persist to cover all past cases, and can be altered only after careful deliberation and consideration—this gospel it is our proud duty and privilege to preach, as against the cure-alls of the sociological charlatan or the encroachments of a benevolent executive despotism.

The Massachusetts Constitutional Convention

By the Editor

After a campaign in which the only discernible issue was between those who favored and those who opposed radical changes in the constitution, the delegates to the Massachusetts Constitutional Convention were elected on the first of May, and assembled for their first session on the sixth of June. The vote was so light as to indicate a deplorable apathy on the part of the people in the selection of the men to whom they committed a task of paramount importance. No doubt this was in part due to the absorbing interest of the Great War. Some of the papers described the occasion as "the untime-liest moment ever chosen to draw a new constitution for a modern state." There was even talk of adjourning the convention till the close of the war. Happily, however, these proposals were rejected, and the delegates addressed themselves to their labors with a fine seriousness of purpose and an evident appreciation of the momentous consequences dependent on their actions. But public indifference continued. Hearings before some of the most important committees, on subjects which had been widely discussed and were supposed to be of vital importance to the people, were scantily attended. In some instances, meetings of such committees were adjourned because not one single representative of the public had accepted the invitation to be present and express his views. The only hearings which attracted anything like a crowd were those on the subjects of prohibition

and the anti-sectarian amendment. So notable and persistent was this public neglect of the convention as to arouse wondering and even alarmed comment on the part of the press, not only in Massachusetts but in other states as well. But this did not react upon the convention itself. By way of contrast, it is encouraging to note the earnestness with which the members have worked for the solution of the problems before them, the general excellence of their debates, and the spirit of good sense, liberality, and thoroughness which has characterized their deliberations.

At its opening session the convention listened to a very able and inspiring address by Governor McCall. Lacking space to reproduce it here in full, we are sure our readers will be glad at least to see the following extracts: "You are meeting today," said the Governor, "under the dispiriting influence of war, and at the first thought it might seem that the time was not propitious for your work. But with all its evils, war often brings a quickening perception of conditions. It makes more alert the sense of danger, and experience has shown that under its shadows have been devised some of the most liberal and enduring systems of government. We have a convincing instance in our own history, since our Constitution was framed when the country was in the throes of the great revolutionary struggle. The autocratic origin of the present war, sweeping like a devastating conflagration

over the whole world, has produced a reaction in favor of popular freedom and those democratic institutions which it was the first purpose of the framers of our Constitution to establish. We are now living in a very different world from that upon which our fathers looked. But human nature remains the constant factor, for it has changed little, if at all, from the earlier time, and the necessity is no less great now than then that power should be defined and political rights made secure. I take it that your duty is not so much to create a new constitution as to adapt to modern conditions the principles of the constitution already made. That constitution provided with greater perfection than was ever before witnessed a mechanism through which a democracy might express itself, and in spite of any obstacles that then existed, it was able to express itself fairly. The democratic idea will be, I think, the animating principle in your deliberations, and it will be your concern to determine how it may most surely and safely express itself under the conditions of our time."

"We have recently been told that the world must be made safe for democracy. There is a sense in which this expression would not convey quite the proper conception of democracy. Democracy is not a timid flower, an exotic which needs to be sheltered from the winds and storms, but it is a strong man, making his way in the face of tempests upon the open heath, having in him all the strength of the race; and there is no higher power which can patronize him and make the world safe for him to live in. He would be

little attracted to the hothouse or to a fenced and protected enclosure. When democracy fully comes into its own, it will hold sway by imperial right, and not by the grant and favor of anybody, and it would perhaps be more true to say that democracy will come into its own, not when the world is made safe for it, but when it has made itself safe for the world. It can be made safe by endowing it with the necessary organs, by giving it eyes and ears and sure methods of expression, and by giving it a spinality which will enable it to stand erect. Without appropriate organs, it would be, as it has so often been, the easy prey of organized privilege; it would tumble about itself, and be as helpless, with all its strength, as the blind Polyphemus, the huge and shapeless monster to whom the light had been put out. Democracy has usually been at a disadvantage on account of lack of organization. From lack of organization it has been compelled more than once to bear the guilt of glaring faults, and it has failed to promote the great ends of government. From lack of effective methods of expression it has often seemed to be the government of the most violent and noisy, while the great silent deeps of the people were untouched and dumb. A few men united can scatter confused counsels in a great mass divided or made up of individuals animated by no common plan or purpose of action. Democracy has been too much regarded as a mere ideal to be declaimed about, and not as something which should be shaped to animate and direct practical government in a responsible fashion."

"Democracy is not opposed to authority. In the nature of things it is subject to it and cannot exist without it. But it must be an authority which is essential and inborn, and not an authority that is artificial and imposed upon it. A democratic government is one in which the people rule. But their rule must not be arbitrary and subject only to their own desires. It must be based on justice. The chief purpose of a state is to secure order under justice. Order may be obtained by governments of the most autocratic character, but the element of justice will be little seen, for there can be no broad and comprehensive justice under a government of privilege, which is itself a system of injustice to great masses of men. The mere counting of the people does not establish what is right and what is wrong, for justice in every case cannot rest upon the will of the more numerous, any more than upon the will the stronger. The few who are at the moment stronger have no right to trample upon the many, and on the other hand, the many who by the power of numbers in a democracy are stronger have no right to oppress the few. In either case the right rests upon superior force, and if, in the scheme of things, right may be based upon power, then we must recognize force and not justice as the final arbiter of the world, and there is an end of the moral universe. A great nation with its armies may overrun a weak one, but the greater the relative strength of the oppressor, the more heinous is his crime against heaven. And in the same way in a state, a mass of men may not of right in their or-

ganized capacity do injustice even to an individual man. The limitation of justice must rest upon the action of those who are the more powerful because of numbers, just as it must rest upon those who are the more powerful for any other reason; and when men have their rights taken away from them and are beaten down by oppression, there will always remain the cry to heaven which it is nefarious ever to provoke."

"You may best provide against injustice by preventing snap judgments and securing to the great mass of the people the opportunity to see and to comprehend what they are about to do. Unless action is preceded by forethought, it is likely to be followed by repentance. The government of a great democracy must of necessity be conducted by representatives or agents. But it is indispensable that the principals shall always be able to see how their government is carried on. There should be no invisible agencies, never chosen by the people and not acting in the public weal, but serving purposes of their own. In order that it may be pure, representative government should be so open that the winds may blow and the sun shine through it. There should be nothing secret or hidden in its operation. Limitations upon government should not be wholly vague and general. Our system in America has express limitations, and that is one of the distinctive things in our freedom. Certain fundamental rights of the individual are protected even against the encroachments of government itself. They are rights which have been established in the long strug-

gle of centuries between autocracy and liberty; they are rights which are of the very essence of freedom, and which governments have at times been prone to invade. Among them are the right of free speech and of a free press, the right to worship God according to the dictates of one's conscience, and the right to be heard by judges surrounded by every safeguard for the unbiased administration of justice."

"The instrument which you are about to revise is the oldest written constitution now in force anywhere in the world. This is not a matter of mere antiquarian interest. Some of the peoples now engaged in the war need to be taught that democracy does not mean disorder. Our history presents an invigorating example of stability, of freedom, and of order that conclusively shows that liberty is not license, and that the rule of the people does not mean the abrogation of law. It must make a convincing appeal to them that during the century and a half of the life of our constitution there has been no spot upon the globe that has on the whole been better governed, that there has been no place where the door of opportunity has been more equally open to all the children of men, that there has been no state that has better illustrated the blessings of free government, and that has made greater progress in those things that tell for real civilization. While the old order changes and gives place to the new, let us approach with reverence the work of adaptation, and realize that that which has served us so well in the past, and under which

we have grown so great, should not be lightly cast aside. The Constitution of Massachusetts is not only the oldest written instrument of government now in force, but of all our state constitutions it is by far the most brief. This is no slight advantage. A constitution is not a statute. It should be a declaration of fundamental individual rights, accompanied by an outline of a frame of government through which organized society may perform its work. In our day, social and economic conditions change with great rapidity, and statutes may be required which will soon become obsolete and outgrown. But if the constitution—the fundamental law of the commonwealth—is made to partake of the nature of a statute, if it shall attempt to specify in detail the rules which should govern the ordinary relations of men to each other and to the state, it cannot hope to have a high degree of permanence."

"And so, gentlemen, the superlative importance of the work you have undertaken justifies the sacrifices you are making. What you do here may affect profoundly the future of the commonwealth for generations, and it may profoundly affect also the future of other states and of great populations beyond the sea. If you shall pursue your task with diligence and wisdom and your work shall be ratified by the people, you will have the proud satisfaction of having rendered your fellow men a service as distinguished as it is unique. It is a happy contrast that you present, when amid the din of arms and when the tread of mighty hosts is shaking the earth and force

is settling the relations of nations to each other, you are attempting to perfect a peaceful mechanism through which justice and reason instead of force may have sway over the destinies of men. May the influence of your example help somewhat to bring about the emancipation of mankind, to the end that brute force may be supplanted by reason, and the hideous brutality of war, with its vandalism, its murder, its slavery, its rapine, and the other imps which it engenders, may be driven from the earth."

The convention promptly effected an organization, and elected Hon. John L. Bates, a former governor of the commonwealth, as its president, entrusting to him the appointment of the twenty-four standing committees to whom should be referred the various proposals for amending the constitution. The difficult task of selection was performed with such fairness, impartiality, and wisdom as to win the cordial approval of the convention itself and of the people of the state. The convention decided that its resolutions should be determined upon a call of the roll, rather than by secret ballot, that its committees should hold duly advertised public hearings, that a verbatim report of its proceedings should be made, and that, after a certain time, no adjournment for more than seven days should be taken. It was voted that all proposals for the amendment of the constitution must be presented and filed not later than June 25th, and that the various committees should have until July 16th to complete their investigations and make their recommendations and reports.

It may be mentioned here that when that date arrived many of the committees had cleared their dockets, but several of the most important were in arrear. About 200 reports had been filed out of an expected total of 300. It was therefore necessary for the convention to grant extensions of time to several of its committees. Generally speaking, the delegates, both in the separate committees and in the committee of the whole, have been diligent and faithful in their labors. But the magnitude of the task imposed upon them has been such (for reasons which will presently appear) that their sessions have been much more protracted than was expected. Occasional expressions of complaint at the slow progress of the convention are heard in the public press, and it is certain that an immense amount of work still lies before it. At the time this review is written (September 15th) it appears doubtful, even improbable, that the new constitution will be ready for submission to the voters at the November election. It is not obligatory that it should be so submitted. But the alternative is the calling of a special election, which has the notorious disadvantage that it brings out only a small minority of the voting strength—an unfortunate way of settling grave problems of government.

On the evening of the 25th of June it was found that no less than 301 proposals for the amendment of the constitution had been filed. It is not possible within the limits of this article to enumerate them or to attempt a detailed analysis. It must suffice to say that the flood of proposals was un-

precedented, bewildering. Some of them possessed obvious merit, others were ridiculous. A few were suggested by wisdom and ripe experience, many others embodied the hopes of high-minded visionaries, of zealous partisans, of reformers of every shade and degree. Of course there were amendments relating to liquor prohibition, votes for women, the initiative and referendum, the single tax. But these were only the beginning. Not a section, hardly a line, of the original constitution but was assailed in the spirit of change. Propositions were advanced for alterations in every department and branch of the state government, ranging from suggestions of the most radical kind to the further regulation of petty and inconsequential details. There were vicious attacks upon the courts; there were socialistic schemes; there were proposals for government by popular vote; there were pleas for lodging autocratic power in the executive; some wished to abolish the senate, others to increase vastly the powers of the legislature. The propositions relating to what is generally called "social welfare" were innumerable. They included the grant to the legislature of authority to make laws against offensive "smells, sights, and sounds"; to legalize baseball and other athletic sports on Sunday; for the protection of women workers at the time of childbirth; for public ownership of public utilities; for public ownership of natural resources; for non-contributory old-age pensions; for the establishment and maintenance by cities and towns of slaughter houses and cold storage warehouses; to authorize cities and towns to engage in

the manufacture and distribution of fuel and ice; for a state fire insurance fund; for workmen's compensation acts; for public markets for food stuffs; for state aid for cases of cancer and tuberculosis. Some of the foregoing, as well as numerous other amendments, were advocated by the American Federation of Labor, which was particularly determined in its insistence upon the initiative and referendum and in the proposal to take away from the courts the power to interfere in labor disputes by the writ of injunction.

This frightful welter of proposed change caused the good people of Massachusetts (if one may judge by the utterances of the press) a feeling akin to consternation. On all sides were heard exclamations against "cluttering up the constitution" and against the "fine assortment of fads and fancies" placed before the convention. One prominent journal says: "There should be a care lest the constitution of Massachusetts be made a joke, rather than a precious document protecting the rights of all the people." Another cries with fervor, "Keep the constitution of Massachusetts a real constitution!" One thinks that "this deluge of propositions poured out before the members of the convention is a product of the social conscience of the age." But another declares: "It is the field day of the cranks, and every sort of proposition that undigested uplift can suggest will infallibly be found in the mass of flotsam and jetsam cast up by the flood when it is time to do a bit of thoughtful intellectual beach-combing." In more temperate vein the Boston "Evening Transcript,"

says of the aggregation of proposed amendments that "taken together they open up many questions of the largest importance—indeed there is scarcely a question they do not pry open. And in direct proportion to their number and complexity will be the need for dealing with them carefully, yet summarily. It is sure that much of the subject-matter which they propose has no proper place in a state's organic law. If introduced as an intricate series of amendments to the constitution itself, they will secure no good results. They would most likely court the rejection of the convention's whole work at the hands of an electorate confused and distrustful. If by any chance they should not be rejected a constitution which sought to legislate on all subjects and sundry, would merely prove its dangers and worthlessness within two years of trial. The only safe guide for the convention will be a determination to keep the organic law as simple as possible."

But a very small proportion of the projects offered survived the process of sifting and examination by the committees. When their reports were made, it was found that the amendments recommended for the consideration of the convention were not at all numerous, though they were nearly all of high importance. In the first place, the committees wisely eliminated a great number of proposed amendments because the matters to which they related were already within the competence of the legislature, and those who came to the convention with them were simply knocking at the wrong door. Such, for instance, was the disposition

made of the proposal to legalize baseball on Sunday, and of a proposal for the "preservation of property of historical or antiquarian interest," and of one to authorize municipal lighting systems. Other suggestions for changing the constitution were cast overboard by the committees because the hearings before them had shown no evidence whatever of a popular demand for the measures in question or that they were supported by more than one or a few individuals. And still others were rejected in the preliminary stage as being revolutionary, dangerous to the liberties of a free people, and subversive of tested and approved systems of government. Though no one could accuse the delegates of being narrow-minded, they showed no disposition to welcome change for the mere sake of change. Modernizing a constitution, it seemed to them, does not necessarily involve making junk of all existing institutions, the good with the bad, that which is perennially excellent with that which is obsolete. So, when a delegate proposed to rewrite the preamble to the constitution, eliminating any reference to such antiquated notions as a "social compact," the committee unanimously voted "that the preamble of the oldest constitution in the world, drawn by John Adams, ought not to be changed." It is not meant to convey the impression that the convention is an ultra-conservative body. To judge by the work of the committees, it is distinctly liberal and progressive. It is certainly not reactionary, but neither is it radical as a whole nor fanatical. The general average of public opinion as to the

work of the convention, at this stage of its proceedings, appears to be well reflected in the following editorial from a leading Boston journal: "The first sheaf of committee reports revealed on the whole very level-headed action on the part of the various committees. Rejecting outright many proposals of a legislative character, and many that ran too sharply counter to established American conceptions of government, the committees have shown a firm disposition to heed the quiet dictates of wisdom and not the noisy seductions of demagogues. If the convention as a whole supports the verdicts rendered by their special juries, there will be good reason for satisfaction, not only reassurance of those conservatives who have feared the convention would take too radical measures, but also as a contribution to the soundly liberal cause. Those reforms which Massachusetts does need will be distinctly helped on their way if they are freed from the company of the many mistaken proposals which have been submitted to the convention."

Of the proposals not eliminated by the committees, the one which aroused the greatest popular interest, elicited the longest and warmest debate, and most gravely threatened the harmony and good spirit of the convention, was the so-called "anti-sectarian amendment." Citizens of other states will scarcely understand this unless they are first informed that the subject of state and municipal subsidies to charitable and educational institutions conducted privately or under the auspices of religious bodies has been a bitter

issue in Massachusetts politics for many years. And it has not been solely a religious war. Many who were indifferent to that side of the question objected to the existing practice as extravagant and an improper use of the public money. It is asserted that, since 1861, nearly nineteen million dollars have been thus appropriated. So high was the feeling on this subject that the Boston "Journal" declared that "the constitutional convention will have justified its existence when it has settled this ancient and dishonorable quarrel, even if it accomplishes no other legislative reform." Various proposed amendments were introduced. Some, but not all, bore traces of a strong religious animus. Without analyzing them in detail, it may be said that some prohibited the grant of public funds to any institutions "under sectarian or ecclesiastical control," while another, the most drastic, proposed to forbid grants of financial aid to any institution "which is not a state, county, city, or town institution established by statute, ordinance, or law." There was no opposition whatever to the purely anti-sectarian feature of any of the amendments. But as to carrying the prohibition further than this, very wide differences of opinion became apparent in the committee. Finally a new proposal, in the nature of a compromise, was introduced by the chairman of the committee, Mr. Edwin U. Curtis, "whose tactfulness and fair play (we read) have long been conspicuous," which provides that "no grant, appropriation, or use of public money, property, or credit shall be made or authorized

for the purpose of founding, maintaining, or aiding any other school" than the common schools of the state, "or any college, infirmary, hospital, institution, or undertaking which is not conducted according to law under the exclusive control, order, and superintendence of public officers and agents authorized by the legislature," excepting only the Massachusetts Soldiers' Home. This was accepted by the committee, notwithstanding a strong effort to save from its provisions some of the well-known and excellent technical schools in the state which have hitherto depended in some measure upon the financial assistance of the state. The amendment was adopted by the convention sitting in committee of the whole by an almost unanimous vote, and on August 22d was formally approved by the convention as such, and ordered to be referred to the people as an amendment to the constitution by a vote of 275 to 25. Immediate and general expressions of relief and satisfaction were voiced by the press. Said the Springfield "Republican": "The way in which this troublesome and at times threatening question of state aid to private institutions has been handled reflects great credit upon the capacity of the convention for statesmanship. It had been predicted that the convention would be wrecked on the sectarian issue, but the outcome increases one's confidence in the inherent capacity of Massachusetts for self-government."

Next in interest and importance was the attempt to write into the constitution of Massachusetts a provision for the compulsory initiative and referen-

dum. The forces advocating direct legislation were well organized and ably supported and most energetic and persistent in their campaign. Those opposed to the proposition were not less alert nor less determined. They rallied to their standard the most brilliant and convincing speakers of all those who addressed the convention. The press took sides. The people displayed a strong interest. In effect, the battle was thoroughly well fought. As early as June 16th a plan for the initiative and referendum, applicable both to constitutional amendments and to ordinary legislation, and not differing materially from the system in force in some of the western states, was introduced by Joseph Walker, a former speaker of the Massachusetts House of Representatives. It was sponsored by an organization called the "Union for a Progressive Constitution," and it was explained that the purpose was to make the plan for direct legislation as conservative as possible while yet saving its essential principle, which was to give the people the last word in legislation. At a later day, however, when it appeared possible that a compromise might be effected by adopting the plan of the initiative, but restricting it to matters of ordinary legislation, the representatives of union labor who were supporting Mr. Walker's proposition were solemnly warned by Samuel Gompers that they should be "unsparing in their efforts" to secure its extension to constitutional amendments. And generally the advocates of direct legislation showed anything but a conservative disposition. Before the committee and on the floor, they

were led by Henry Sterling, the legislative agent for the state branch of the American Federation of Labor. They were supported by a number of very able and distinguished speakers, among whom were two Harvard professors, Lewis Johnson and Albert Bushnell Hart; also Sherman L. Whipple, the leader of the Boston bar, Thomas J. Boynton, a former attorney general of the state, George Fred Williams, and Edward A. Filene, who said that he spoke as a business man and advocated the initiative and referendum from a business man's point of view.

It is unnecessary to summarize the arguments of these speakers. They presented nothing new. Chiefly they consisted in abuse of the legislatures, denunciation of the courts, and vague but impassioned appeals for "more democracy." Mr. Walker said the trouble was that the state had a hard and fast written document, framed over a hundred years ago, and that the only safety for popular rights was to allow the people to appeal from the decisions of the court. Mr. Whipple declared that the legislatures have yielded to predatory interests and betrayed the people, and that the courts were against labor and the people. It seems to be unhappily characteristic of the defenders of the initiative and referendum that the ardor of their convictions too often betrays them into vehemence, not to say truculence. This temper also was manifested in the convention, as when Mr. Walker predicted that unless these agencies of direct legislation were given to the people, continued distrust of the legis-

lature would give rise to rioting and other militant outbreaks, or when a Mr. Brooks said: "The people of this country are going to have real democracy. Are we going to wait until the lid blows off, or shall we give it by peaceful means through the initiative and referendum?" Note also the statement of Mr. George Fred Williams that "the people of this country never have had real democracy. It will come eventually either through a revolution or by peaceful means." It should be added that the speakers on this side of the question (and this also is highly characteristic of them) consistently declined to say what measures, or what kind of measures, they expected the people to enact by means of direct legislation. An exception must be made, however, in the case of Mr. Sterling, who, in response to a question, read a long list of changes in the constitution which the labor interests would seek if they secured the initiative and referendum. These included the most advanced, not to say extravagant, demands which the unions have yet put forward, and also breathed their persistent and deplorable hostility to the courts.

The other side was well supported, too. Very notable addresses, embodying masterly arguments, were delivered by Frank W. Grinnell, secretary of the Massachusetts Bar Association, Nathan Matthews, a former mayor of Boston, President Lowell, of Harvard, Charles F. Choate, Professor George B. Churchill, of Amherst, and others. An interest which is deeply concerned in matters such as this, but which rarely hears a voice lifted in its

favor, found a defender in Mr. Charles L. Underhill, who appealed for the defeat of the initiative and referendum, as a measure of protection for the great mass of the people, who are being ground between capital and labor. Labor and capital, he said, can fight for themselves, but the great unorganized majority would be unable to make use of the agency of direct legislation, and would be at the mercy of the organized forces. It would appear that altogether the most effective and convincing speech yet addressed to the convention was that delivered by Professor Churchill in opposition to the initiative and referendum. Surely it is an omen of good promise when a college professor, arguing the conservative side before a constitutional convention, is listened to with rapt attention, is "repeatedly cheered" during his address, receives warm congratulations from enemies and friends alike, and is universally and highly lauded by the public press. Finally, the committee having the matter in charge, by a vote of eight against seven, determined upon a favorable report to the convention of the Walker plan, with some modifications, the minority members filing at the same time a very powerful dissent. At this writing it is impossible to predict the ultimate fate of the proposal, but it seems not unlikely that some form of constitutional amendment embodying the initiative and referendum will be submitted to the people.

Many plans for strengthening and enlarging the power of the governor were presented to the convention. Elsewhere in this number we have spoken of the trend towards executive

leadership. This tendency found ample expression in the proposals laid before the Massachusetts convention. One amendment, which received the favorable consideration of the committee in charge, looks to the abolition of the present Executive Council and the substitution for it of a cabinet of nine members, all to be appointed by the governor, and who would severally have the authority to appoint any boards or commissions necessary to carry on the work of their several departments. This proposal—or one very similar to it, for there were several—was supported by President Lowell. The most comprehensive and far-reaching plan was presented by Josiah Quincy, the chairman of the committee on the executive. In laying it before the committee, he called attention to the fact that the trend of the times, in government, is to the centralization of power in the hands of the executive. This plan was adopted, almost in its entirety, by the committee, and a favorable report to the convention was ordered on the following propositions: That the terms of the governor and lieutenant governor shall be two years, instead of one as at present; that all administrative and executive officers shall be subject to removal by the governor alone, after a hearing (instead of by the governor and council together); that the governor shall have authority to initiate and recommend bills to the legislature, which shall be known as "executive bills," and which cannot be stifled in committees, because they must be acted on within thirty days; that the governor shall have power to refer to the voters for final decision any executive bill which

the legislature refuses to pass, and also any bill passed by the legislature over the governor's veto; that the governor and the heads of the state departments shall have the right to appear before either branch of the legislature, and to speak, though not to vote; that the legislature may require the governor or the heads of state departments to appear before either branch to furnish information; that the governor may return any bill passed by the legislature with specific suggestions for its amendment; and that the governor may veto particular items of such legislative measures as have failed to be amended in a manner satisfactory to him. A proposal for the preparation and submission of a budget by the executive department was also favorably reported by the committee, according to which it will be the duty of the governor, within three weeks after the legislature convenes, to make recommendations for the appropriation of money for the various needs of the state, and also to indicate the means by which the funds should be raised. But a provision, from which three members of the committee dissented, permits the legislature to increase the appropriations advised by the governor. On the other hand, proposals to incorporate in the constitution a means of "recalling" the governor by petition and popular vote were smothered in committee.

An admirably conservative temper has been shown by the convention in dealing with the numerous proposals for reorganizing the excellent judicial system of Massachusetts. Labor was on hand with a demand for the popu-

lar election of all judges, for terms not exceeding five years, to which was added its favorite proposal that judges should be subject to recall on petition and popular vote. The committee on the judiciary rejected this plan, only one member disagreeing, and its adverse report was accepted by the convention sitting in committee of the whole, on a viva voce vote without debate, though a motion prevailed for a reconsideration of the question at a later day. It is not surprising, in these days, that an amendment should have been introduced depriving the courts of their authority to decide upon the constitutional validity of statutes. It was presented to the convention in various forms, some being absolute, others providing that no decision should be given against the constitutionality of an act of the legislature unless by the unanimous vote of the supreme court, or, according to one plan, by the vote of at least two-thirds of the judges. But all these propositions were reported adversely by the committee, and were definitely defeated in the convention itself by a vote of 162 to 77, after a long debate in which the entire subject was thoroughly discussed. A resolution for an amendment forbidding the courts to issue injunctions in labor disputes was referred to the proper committee. A public hearing was advertised and held. We read that it was attended by "a large delegation of laboring men and women, headed by various union officials," but apparently by no one else. The committee reported adversely on this resolution. It has not yet been considered by the convention, but it does not seem

likely that it will win much favor. There was also a proposal doing away with the unanimity now required of juries, at least in civil cases, and providing that verdicts might be rendered by a vote of five-sixths of a jury. The principal speech in opposition to this proposed change was delivered by the venerable ex-Chief Justice Morton, whose address was heard by the convention (so we are told) with "respectful and even filial" attention. Evidently his views made a profound impression, for the committee of the whole, sustaining the adverse report of the standing committee, voted to reject the plan in its entirety. A similar fate befell a proposal to remove the constitutional privilege of the defendant in a criminal trial to stand mute (refuse to take the witness stand) without comment by court or counsel, and a proposal to establish the office of public defender for those financially unable to procure counsel. The convention was unanimous in its vote against a resolution for the abolition of capital punishment, and could see no virtue in a proposition that when an amendment to the Constitution of the United States is proposed, it shall be submitted to a vote of the people of the state before being voted on by the legislature. A resolution is pending to give the legislature concurrent power with the governor and council in granting pardons to murderers of the first class. Other states have tried this experiment and rejected it with profound disgust, and their newspapers are advising the Massachusetts convention to take warning from their disastrous experiences.

The whole system of state government being thrown open to the consideration of the convention, it is not surprising that proposals for radical changes in the legislative department should be offered. Mr. Matthew Hale presented a resolution for the abolition of the senate and the concentration of legislative power in a representative body of one chamber. Former Lieutenant Governor Robert Luce, conceding that the application of the "commission form of government" to a state would be going too far, offered a plan, the chief provision of which would reduce the senate to a membership of fifteen, curtailing its power to negative general laws passed by the house, but on the other hand committing to it what he calls "a newly developed function of government, the administrative function." According to this plan, the members of the senate should be chosen for long terms, given salaries large enough to attract men of eminent capacity, and expected to devote practically their entire time to the administration of state affairs, the sessions being virtually continuous.

The sentiment in favor of prohibiting the manufacture and sale of liquor has prevailed so far as that the committee to which the question was referred has rendered a favorable report on an amendment which would make the state "bone dry." The Boston "Post" says: "It was figured that the committee would stand pat in favor of the present law, which calls for local option. But it is evident that the example of the national government had its effect." But the advocates of the

extension of the suffrage to women were not equally successful. Though the hearings before the committee were well attended, and the arguments presented were numerous, varied, and vigorous, the committee decided against recommending a constitutional amendment by a vote of nine against six. The result, it is said, surprised some of the committee's own members. But it is thought that the chief reason for the adverse report was the very decisive defeat of the amendment for equal suffrage at the polls less than two years ago, which was taken as an expression of the people's judgment and will, so recent as to justify the convention in refusing to submit the question again this year. On the other hand, there was a somewhat fantastic proposition to compel the citizens of Massachusetts to fulfil their duty as voters, by imposing an annual poll tax of \$10, with abatements amounting in the aggregate to \$8 in favor of any elector who could show that he had faithfully cast his ballot at the state and municipal elections. The committee killed this proposal. The "short ballot" plan was warmly advocated and as vigorously assailed at hearings before the committee, but it does not appear that any recommendation, favorable or otherwise, has yet been made. But an amendment to provide for absentee voting, chiefly for the benefit of men in the military service, has been reported with the approval of the committee.

To review the discussion of the numerous questions arising under the general head of "social welfare" or that of "public administration," would

carry this article far beyond its necessary limits. It must suffice to say that the proper committees have reported against projects limiting franchises to 25 years, or providing that they shall always be subject to revocation; against the public ownership of public utilities, and against empowering cities and town to acquire and operate them, and against the public ownership of municipal lighting plants; against publicity in respect to food kept in storage; and against state ownership and operation of street railways. On the other hand, the committees have reported in favor of authorizing the state, cities, and towns to buy, sell, and distribute food, fuel, and other necessities of life; in favor of authorizing the state, cities, and towns to take, develop, and sell land for homesteads for citizens; in favor of giving the legislature power to provide for any and all forms of social insurance; and in favor of a compulsory one day's rest in every seven for all workers, although this last proposition was opposed by a body of railroad employees, who said that they were well taken care of by existing statutes and by agreements with the roads. The regulation of billboard advertising was the subject of much argument and discussion, but was generally opposed by the labor unions.

The committee on taxation made short work with a proposed amendment for the single tax on land values, which was urged by Professor Johnson, of Harvard, but has not yet disposed of amendments offered by several delegates which would change the constitution by striking out the requirement that taxes must be "propor-

tional," so as to clear the way for an income tax with heavy surtaxes on large incomes, and with the further very odious provision, advocated by a former governor of the state, that all income tax returns and assessments shall be published or at least be open to public inspection. It is interesting to note that the committee on military affairs has recommended favorably an amendment to empower the legislature to provide for the selection of officers of the National Guard by the merit system, instead of having them elected by the men of their commands, as at present. But in view of the generally conservative attitude of the convention, and its dealing with various other matters, a disinterested observer may be permitted to express some astonishment that the committee should have given its indorsement to a proposal that future amendments to the constitution of the state may be submitted to the people by a mere majority vote of the legislature, instead of two-thirds, and to the further proposition that every twenty years hereafter, beginning with 1936, the legislature must submit to the voters the question whether they desire the calling of a convention to review the constitution.

As to the form in which the work of the present convention will be submitted to the electorate, no final decision has been reached. But it seems highly probable that the convention will adopt the plan proposed by Professor Albert Bushnell Hart, early in the session, and favorably reported by the proper committee. This is as follows: "1. That the work of the Massachusetts Constitutional Convention

shall take the form of a main constitution and of a series of separate amendments, to be designated by the convention. 2. That the main constitution shall be based upon the present constitution and the amendments now in force, which shall be consolidated and arranged as amended, in proper subdivisions under appropriate titles, omitting all articles, clauses, and words not in force, and making no other changes in the provisions and no substantial changes in the language thereof. 3. That the main constitution, consolidated and arranged as aforesaid, and the separate amendments, shall be submitted to a vote of the people in such form that the main constitution and each of the separate amendments shall be voted upon separately. 4. That in case the main constitution shall not be adopted, those separate amendments that shall be adopted, each for itself, shall become amendments and part of the present constitution." The Springfield "Union" rather irreverently remarks that the new constitution "is to be adopted on the cafeteria plan. The voter casts his eye over the revision menu and selects what he likes or thinks he may like, and leaves the rest. Afterwards he may regret his choice, but it will be too late then to change his order." On the other hand, the Boston "Post" regards the plan of submission as "a triumph for the liberal and common-sense idea." It will be well for the convention to remember that to submit an entire new constitution, "take it or leave it" as a whole, is to invite almost certain disaster. They should not forget the experience of New York two years ago.

Constitutional Conventions in Other States

A complete revision of the constitution of Indiana has been advocated by leading citizens of that state for many years, chiefly because of the almost insuperable obstacles which the existing constitution puts in the way of its own amendment. In 1911 the legislature undertook to write a new constitution and submit it to the electors, but the courts held that this was not within the "legislative power" granted to that body. In 1914 the question of calling a constitutional convention was on the ballot, but the proposal was defeated. The legislature of 1917, yielding to strong and determined pressure, adopted an act directly calling a convention for the revision of the constitution; that is to say, it was not provided that the people should vote on the question whether or not they desired such a convention, but the convention was authorized and summoned by the legislature. The delegates were to have been elected in September. But in July the act was adjudged invalid by the supreme court on the ground that, while the legislature may propose separate amendments to the people, or, as an alternative, may take their will as to the calling of a convention, yet if changes in the constitution are to be effected by means of a convention, the mandate for it must come from the people, not the legislature.

In Illinois, the question of a constitutional convention has likewise been under consideration for many years. It was urged upon several successive legislatures without effect. But the proposal having been strongly ad-

vocated by the present governor of the state, the legislature in March of this year adopted a joint resolution, not for the calling of a convention, but for the submission of the question to the people at the election in November, 1918. It is understood that the proposal to be voted on will include the question whether the convention, if called, shall present amendments to the existing constitution of 1870 or frame a new instrument. But if it is to be a new constitution, Illinois will have to wait a long time for it. If the question passes in the affirmative, the duty of making arrangements for the convention will devolve upon the legislature of 1919. That body will provide for the election, either general or special, at which the delegates shall be chosen. If a special election is called, it is possible that the convention might begin its work before the end of 1919, but if the choice of delegates is deferred to the general election of 1920, the convention can hardly assemble before the following year, after which there must come the decision of the people at the polls, accepting or rejecting its work.

In New Hampshire, a proposal for the calling of a constitutional convention was carried at the last general election by a substantial majority, out of a very light vote. The delegates are to be elected in March, 1918, and the convention to meet in the following June. The legislature of Arkansas has adopted an act for the assembling of a constitutional convention at the capital in November, 1917, and the

delegates have been chosen. And in Washington, the legislature has voted to submit to the people at the general election in 1918 the question whether or not they desire to have a new constitution drafted for them by a convention. Having taken this action, it has very wisely decided not to submit separate constitutional amendments in the meantime. A number of proposed amendments were before the legislature, including one which would permit changes to be made in the fundamental law of the state by a favorable vote on an initiative petition (as may now be done in Oregon), but none was acted on affirmatively. In Kansas and Missouri, the necessity or propriety of rewriting the constitution of the state by means of a convention was urged upon the legislature by the governor. No action of this kind has been taken in Kansas. In Missouri, a bill for a constitutional convention failed to receive the sanction of the legislature, which, instead, adopted six constitutional amendments for submission to the voters in the 1918 election. The people of Nebraska are to have an opportunity next year of expressing at the polls their will as to the revision of their constitution by a convention. In Texas, a legislative act submits the question of a constitutional convention to the voters at a special election in November, 1917, and if it is favored, the convention will meet in January, 1918. In North Carolina the same question will appear on the ballots at the general election of 1918, and if a majority approve the proposal for a convention, it will be called together in May, 1919.

On the other hand, three states, Colorado, New York, and South Dakota, voted against the revision of their constitutions at the elections of 1916. And the people of Tennessee rejected a proposal for a constitutional convention, at a special election on July 28, 1917, by an overwhelming majority. It is said that less than a quarter of the qualified voters went to the polls, and that only about one in five of those who voted favored the calling of a convention.

The result of the vote in New York is not surprising, in view of what befell the proposed new constitution of 1915. But it has been stated that by the end of April of the present year, no less than fifty proposals for amending the existing constitution had been introduced in the legislature. In the light of these facts, a very interesting proposition has been made, which is attracting much attention in the state. It is that a commission of fifteen members should be appointed by the governor, charged with the duty of revising the constitution and of reporting the result of its work to the legislature in 1918. It has been pointed out that the records of the constitutional convention of 1915 (which cost the state a million dollars), as well as the great mass of material prepared for its information and guidance, are still intact and would furnish an excellent foundation for the work of the proposed commission. Such a plan is not without precedent in the state of New York. In 1869, the people rejected a new constitution which had been framed by a convention two years before. In 1872 the legislature, on

the proposal of the governor, authorized the appointment of a commission of thirty-two "eminent citizens" to revise the constitution. This body reported to the legislature, which adopted most of its recommendations, and

eleven amendments, many of them similar to those which had been so recently rejected, were submitted to the popular vote in 1874, with the result that all but two of them were adopted by large majorities.

Piecemeal Amendment or Complete Revision

The problem as to whether it is more expedient and productive of better results to submit to the people separate and specific amendments to a constitution, or to invite the popular vote on a revised and rewritten constitution, as an entire instrument, is receiving much attention in those states which have committed themselves to the calling of a constitutional convention or in which important changes in the organic law are in contemplation. On the one hand, some of the newspapers say that "amendments are all very well in their way, but states have found that constitutional conventions are more to be desired than multitudes of amendments." The opinion of the Topeka "Capitol" is that "constitutional revision will be properly done if done by a convention of delegates elected for that purpose exclusively, with ample time to attend to it, and the constitution or amendments then submitted to the people at a special election called for that and no other purpose. Amendments submitted by the legislature at general elections do not receive discussion or attention."

On the other hand, it is certain that a new constitution submitted as a whole, however excellent it may be, runs a very grave risk of being reject-

ed. It will be wholly satisfactory to very few. Many will object to particular features in it. A combination of minorities will destroy it. As pointed out by the New York "Evening Post," in regard to the recent action in that state, "many people think that the chief trouble with the proposed new constitution of 1915 lay in the fact that thirty or forty amendments, each one of which had developed a lot of opposition, were all submitted as one, so that the hostility to each was spread over all, with the result that the revision was killed at the polls by an adverse majority of half a million votes." Such is also the opinion of the Lincoln (Nebraska) "Journal." "The recent experience of New York with a new constitution," it says, "has illustrated a common fact. It is all but impossible to secure the popular ratification of a new constitution submitted as a whole. The diverse objections to the provisions of the new constitution are automatically logrolled together into a majority for its defeat. One objectionable clause may defeat the whole." A contributor to the Chicago "Herald" declares that, "should an attempt be made to draw a complete constitution that may be presented as a whole to the people, to be adopted or rejected, there will be such

a clashing of interests that the resulting compromises and agreements will satisfy nobody; whereas, if the different questions be set forth in the form of separate amendments, each dominant interest can present its problem more to its liking, and it will be accepted or rejected according to the appeal it makes to the people. The complete constitution plan has a tendency to unite vicious provisions with the good, in order that the voters may be compelled to accept things they do not want or forego those they want." At the same time it is possible to discern, in more conservative quarters, a certain distrust or apprehension as to the possible doings of a convention possessed of the wide authority to write a new constitution, and a fear that much of proved worth in the existing constitution might be needlessly sacrificed. The Chicago "Inter-Ocean," for instance, thinks that "those persons who insist that a constitutional

convention must be held are really engaged in promoting a sort of lottery. They do not know what would come out of such a convention, and they do not know whether the people would accept the product. The whole matter rests upon a speculative basis and is mainly attractive because of its alleged glittering possibilities. Every advocate of some governmental cure-all hopes to get the convention to accept it. If the amending clause of the constitution (of Illinois) were so amended that three sections of that instrument might be amended at one election, the road to constitutional reform would be made easy. At the same time, the many excellent and well-tested features of the present constitution would not be thrown open to a convention of delegates, some with special interests to serve, some with irrational ideas to exploit, and many with experimental processes which they desire to try upon the people of the commonwealth."

The Selective Veto

When a general appropriation bill is passed by the two houses of Congress and laid before the executive, he often finds strong grounds for disapproving some one or more of its various items, though he may be heartily in favor of the rest. Yet he must deal with the bill as a whole. He must either sign it or return it with his objections to the house in which it originated. The veto power given by the Constitution is not selective. That it should be made so—that the President should be given at least a suspensive veto as to separate items in a bill without the

necessity of condemning the whole—has been very frequently proposed in Congress, urged by several of our presidents, discussed with approbation in the public press, and advocated by such representative bodies as the United States Chamber of Commerce, which this year cast a vote heavily in favor of the necessary constitutional amendment. Yet the movement has hitherto failed to enlist that united and determined popular insistence which (happily for us) is still required for effecting a change in the organic law. It may be that it will eventually suc-

ceed. If so, it will come, as constitutional amendments should come, not as the fruit of sudden impulse, but as the result of a sound and natural growth in our political institutions.

Executive authority to veto separate items in appropriation bills first appears in the constitution of the Confederate States, adopted in 1861. The same clause was written into the constitutions of two or three of the southern states during the reconstruction period, and has met with such general favor on the part of the states that it is now a part of the fundamental law of no less than thirty-six of them. That is to say, the governor now possesses this authority in all of the states except the six New England states, North Carolina (where he has no veto power at all), and a group of five central or western states comprising Indiana, Iowa, Nevada, Tennessee, and Wisconsin. It is also a significant fact that Congress has extended this power to the Governor of Porto Rico and the Governor-General of the Philippines in the recent acts providing for the civil government of those possessions. That the purpose and operation of this selective veto may be made clear, it will be appropriate to quote here the provision of the Constitution of New York on the subject, which may be taken as typical of the rest. It is as follows: "If any bill presented to the governor contain several items of appropriation of money, he may object to one or more of such items, while approving of the other portion of the bill. In such case, he shall append to the bill, at the time of signing it, a statement of the items to which

he objects, and the appropriation so objected to shall not take effect. If the legislature be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately considered. If on reconsideration one or more of such items be approved by two-thirds of the members elected to each house, the same shall be part of the law, notwithstanding the objections of the governor." Governor Whitman has strongly urged upon the legislature the submission of a constitutional amendment which would permit the executive not only to "object" to particular items, but to "reduce" those deemed excessive. This seems a logical extension of the power already granted. For it might well happen that an appropriation for a particular public object might be not only commendable but even necessary for the efficient conduct of government, and yet a governor, exercising his conscientious judgment on the subject, might consider it grossly excessive. But legislatures hesitate at this point. To enlarge the governor's power in this respect seems too complete a surrender of the control of the purse, which historically does not belong to the executive branch. Yet the governors of several other states have claimed that their constitutional authority to "disapprove" items in appropriation bills included the right to reduce those objected to in amount. The governor of Pennsylvania has more than once acted on this assumption, and he has been sustained by a decision of the Supreme Court of that state. In four or five other states, the

same course has been taken by the executive, but the courts have not yet passed upon its legality. In Illinois and Mississippi, however, the courts have ruled that the power given to the governor to veto any distinct item or section in an appropriation bill does not give him authority to disapprove of a part of a distinct item and approve the remainder, and if he vetoes a part of an item, as by striking out the words "per annum" or by approving part of the amount of an item and disapproving the remainder, his action is void. And in Oklahoma it has been decided that when an appropriation bill contains only a single item, the governor cannot approve the appropriation and the amount of it and at the same time disapprove the parts of the act which direct how the appropriated funds shall be apportioned.

But if the governor is to be permitted to exercise the veto power upon separate portions of a bill, why stop at appropriation bills? South Carolina and Washington authorize their governors to veto any section of any bill presented to them. In Alabama (and it is substantially the same in Virginia) the constitution authorizes the governor to return a bill to the legislature without his approval, but with a message proposing amendments "which would remove his objections." If both houses accept the amendments, the bill is then returned to the governor to be acted on as in other cases. If either rejects the amendments, it must reconsider the bill. If both reject the amendments, by a majority of the whole number of members elected to each house, the bill becomes a law. So also in Australia, "the Governor

General may return to the house in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the houses may deal with the recommendation." And this enlarged participation of the executive in the business of making the laws, either by the selective veto or by the offering of amendments, is familiar in the countries of Latin America, not only in practice but by the specific authorization of their constitutions. In Mexico, the Argentine, Paraguay, Colombia, and Panama, the president may veto any bill in whole or in part. In Ecuador and Costa Rica, his objections to any bill may take the form of corrections, modifications, or amendments.

Sound reasons for granting a partial or discriminative veto to the President of the United States, in respect to money bills, are not far to seek. Our whole wasteful and haphazard method of making appropriations is at fault. "Pork-barrel" legislation is a notorious and malodorous fact. So also is the pernicious habit of attaching "riders" to appropriation bills, often totally unrelated to the general subject, and which would surely incur the executive disapproval if presented separately. And bills for raising revenue might often be more acceptable to the country at large if subject to executive revision item by item. At least, the possession of such a power by the President would do away with the unseemly spectacle (witnessed in certain former administrations) of bargaining in progress between the White House and the Capitol. But on the other hand, do we seriously wish to

add anything to the transcendent powers already possessed by the President? Leaving wholly aside the special exigencies created by the present war, and disclaiming any purpose of hostile criticism as towards any one of our presidents, it is fair to state, as an undeniable historical fact, that the presidency has grown into an office of such predominant influence and tremendous power as would utterly have appalled the founders of the American democracy, and such as were but dimly within the vision of even the fathers of the present generation. Would it be wise, would it be prudent in view of all possible eventualities, to withdraw from Congress any remnant of its fast diminishing control of the public interests?

Another view of the subject was presented by the Bureau of Municipal Research in its appraisal of the constitution and government of New York, prepared for submission to the constitutional convention of that state in 1915. Speaking of the provision allowing the governor to veto separate items in appropriation bills, it was said: "Under such circumstances the governor is held responsible for the acceptance or reduction of items as passed in measures for which he is not responsible. The power operates as a check on an irresponsible legislature. It does not cure irresponsibility. It does not supply leadership. It does put into the hands of the governor the power to punish political enemies by using the pruning knife where he will, in the plea of economy. The power is not constructive, but may be made highly destructive. It transfers from the legislative committee room to the

executive chamber all the pressure that has been brought to bear in furtherance of the plans of an irresponsible boss. It simply invites another dark-room proceeding, instead of having the business of the state done in the open, in the face of the opposition." If the legislature is still in session when the governor acts on the bill, "he may, if he chooses, get a fair statement of a consistent fiscal policy before the legislature for discussion and action. But usually the legislature has adjourned before the governor has an opportunity to act on many appropriations." The Bureau thinks that a much better plan is that of a budget (not merely advisory, but compulsory), under which the governor is required to formulate, submit, and defend the appropriation bills, thus "securing economy and responsibility in the appropriation and management of public funds."

The question of enlarging the veto power should not be considered as an isolated problem. It is but an element, or a symptom, of that vigorous trend towards executive leadership which is so markedly developing in our political philosophy, and which, in respect to the science of government, many observers believe to be the most momentous phenomenon of our times. The new program involves supplementing the administrative and appointive powers of the executive branch by intrusting to it also both initiative and responsibility in the framing of the laws. It was the old theory that the guardianship of the public welfare was vested in the legislature; the new would confide it to the executive. The selective veto is a step in this direction.

The Government of the Philippines

The Act of Congress of August 29, 1916, providing a revised form of civil government for the Philippine Islands, and which may be described as the "constitution" of that far-flung possession of the United States, presents several features which are of more than passing interest to those interested in the development of the constitutional system. Its avowed purpose is "to place in the hands of the people of the Philippines as large a control of their domestic affairs as can be given them without, in the meantime, impairing the exercise of the rights of sovereignty by the people of the United States, in order that, by the use and exercise of popular franchise and governmental powers, they may be the better prepared to fully assume the responsibilities and enjoy all the privileges of complete independence." The privilege of citizenship "of the Philippine Islands" is accordingly given to all of the inhabitants who were Spanish subjects at the time of the cession (unless they elect to retain their allegiance to the Spanish crown), and the legislature of the islands is given power to provide for the acquisition of citizenship by other natives, by the natives of other insular possession, and by those residents of the islands who are either American citizens or could acquire American citizenship.

The Constitution has not followed the flag to the Philippines. Their people are not citizens of the United States nor entitled to the protection of its fundamental law. But the act under consideration contains a fairly comprehensive bill of rights for the spe-

cial benefit of Philippine citizens. This does not differ materially from the bill of rights enacted for Porto Rico and which was noticed in the last number of this REVIEW. It exhibits the same tendency to elaborate and enlarge, rather than to derogate from, the corresponding provisions of the federal Constitution, and in addition contains clauses (probably locally necessary) against the law of primogeniture, against slavery, and against polygamous or plural marriages.

Congress has shown that it still believes in the bi-cameral system, notwithstanding all that is now said against it, by providing that the Philippine legislature shall consist of a senate and a house of representatives, the former chamber replacing the Philippine Commission. Members of the house are elected for three years, and senators for terms of three and six years. Legislators of either body must be able to read and write either the Spanish or the English language. But the qualified electors (males only) may be such as come within any one of the three following classes: (a) Those who under existing law are legal voters and have exercised the right of suffrage; (b) those who own real property to the value of 500 pesos, or who annually pay 30 pesos of the established taxes; (c) those who are able to read and write either Spanish, English, or a native language.

It is declared that the statutory laws of the United States hereafter enacted shall not apply to the Philippines except when they specially so provide, and "general legislative power" is

granted to the Philippine legislature, but "all laws enacted by the Philippine legislature shall be reported to the Congress of the United States, which hereby reserves the power and authority to annul the same," and moreover, acts of the insular legislature must have the approval of the President of the United States if they undertake to establish or amend a tariff, or if they affect immigration or the currency or coinage laws of the islands. A suspensive veto on legislation is given to the Governor General, which it requires a two-thirds majority in both houses to overcome; and even in case of a vote overriding the veto, the bill must again be sent to the Governor, who, if he still disapproves it, is to send it to the President of the United States, and the latter has an absolute and unqualified negative. It is worth noting, in this connection, that Congress has again registered its conviction that the selective or partial veto is a desirable element in the process of law-making; for "the Governor General shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object; and the item or items objected to shall not take effect" unless passed over his objection by a two-thirds majority. Further, notwithstanding the apathetic attitude of Congress towards the project of a national budget system, it has apparently no objection to extending that system to territories and dependencies. This act makes it the duty of the Governor General to "submit within ten days of the opening of each regular session of

the Philippine legislature a budget of receipts and expenditures, which shall be the basis of the annual appropriation bill." He is also vested with "supreme executive power," and is to be appointed by the President with the advice and consent of the United States Senate, to hold office at the pleasure of the President, and is to reside in the islands during his official incumbency and maintain his office at the seat of government. "Whenever it becomes necessary, he may call upon the commanders of the military and naval forces of the United States in the islands, or summon the posse comitatus, or call out the militia or other locally created armed forces, to prevent or suppress lawless violence, invasion, insurrection, or rebellion; and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus or place the islands or any part thereof under martial law"; but if he takes the latter course, he must at once notify the President, informing him of the facts and circumstances, and the President may modify or vacate the action of the Governor. There is also provided a Vice-Governor, who is to be the head of the department of public instruction, and the islands are to send two resident commissioners to the United States.

Adherence to the principles which promote the strength and independence of the judiciary is shown in the provision that the justices of the supreme court of the islands shall be appointed by the President, with the advice and consent of the Senate of the

United States, and the judges of the courts of first instance by the Governor General, with the advice and consent of the Philippine Senate. But one might inquire whether it was paternal solicitude or distrust of native intelligence which prompted the pro-

vision that "no special session (of the Philippine legislature) shall continue longer than thirty days, and no regular session shall continue longer than one hundred days, exclusive of Sundays."

The Political Future of Ireland

Even in these days, when events of the most tremendous import succeed each other so rapidly that it seems as if the history of a century were being compressed within the space of three years, it will not have been forgotten that a home-rule bill for Ireland was enacted by the British Parliament, that it was violently opposed (even to the threat of armed resistance) by the men of Ulster, and that its operation was ordered suspended when the clouds of war began to gather and break over the head of England. Later came the insurrection of Easter week, 1916, the fighting in the streets of Dublin, the pitiful end of Roger Casement's abortive revolution, and his own trial and execution. Out of this ferment came finally the resolution of the British Government to commit the destinies of Ireland to the Irish themselves, and to let them devise their own solution of their own problem. On the 21st of May, the prime minister announced to the House of Commons that the government would call a convention of Irishmen to frame a constitution for Ireland, and that if that body should be able to agree upon any plan for the government and administration of

their country, the British government pledged itself to endeavor to have it enacted into law without delay. That convention is now in session.

Roughly speaking, and disregarding many cross-currents of political thought, the people of Ireland may be divided into three political parties. The program of the Nationalist party is based upon home rule. Their demand is for the re-establishment of the Irish Parliament, destroyed by the Act of Union more than a century ago. To this end they have long worked by a campaign of education and by unrelenting political pressure at Westminster. The essence of the plan is that the control of Ireland's internal affairs shall be wholly committed to Ireland's own parliament, while imperial or federal affairs, with the control of the military forces, shall remain in the government of the empire. "Entire autonomy in internal government of the Irish; co-operation in the imperial parliament in the control of imperial and national affairs," is the demand of the party as voiced by one of its leaders. But this party is inexorably opposed to any dismemberment of Ireland. It never would consent to the cutting off of the northern

counties. If there is to be home rule, it must cover every foot of Irish soil. If there is to be an Irish parliament, it must rule all of Ireland. For while the prosperous north might perhaps stand alone, it is not so with the south. If the Irish nation is considered as a whole, its welfare depends upon the prosperity and the mutual goodwill and co-operation of all its parts.

The Unionists, whose strength is in the northern counties of Ulster, oppose this program. Their demand is for a continuance of British rule from London. Again speaking in the most general terms, the people of Ulster are ethnically different from the men of the south. They are preponderantly of the Scottish and North British type, and are temperamentally unlike the Celts. Again, and this is of the utmost importance, the northern population is overwhelmingly Protestant, while the Catholics have at least as great a numerical superiority in the south. It is in the north also that we find the most successful development of manufactures, shipbuilding, and other industries, the best and most extended banking facilities, and the widest diffusion of general prosperity. The Ulsterites would have but a small minority in an Irish parliament such as the Nationalists demand. And quite frankly they are afraid of the exploitation of their wealth and their industries for the benefit of their less successful countrymen, and equally concerned for the preservation of their religious liberties as against the Catholic south. Persecution, perhaps, is not within their anticipations, but certainly they look forward with dread to the pos-

sible imposition of religious disabilities, direct or indirect, by an all-Irish parliament. Memories of internecine bitterness are hard to efface, and the recollections of Irish Protestants go back to the invasion of James II and the battle of the Boyne. On the economic side, it is not impossible to draw a parallel between the Unionists' opposition to complete home rule and the present attitude of the Catalonians towards the rest of Spain. The case of Belfast is not so very different from that of Barcelona.

The "Sinn Fein" propaganda was at first an intellectual movement, having for its aim the revival of Celtic literature and art, not by outside patronage, but by the efforts of the Irish people themselves. It was to bring about the spiritual and intellectual regeneration of Ireland by the impulsion of its native forces. Perhaps in consequence of intense concentration upon the idea of nationalism, the movement was soon swept into the vortex of politics. If Ireland may live alone morally and intellectually then why not politically? If her spiritual life is her own, why should she be bound with chains to an alien race and an alien government? It was the Sinn Fein that was behind Casement's rebellion. It was the Sinn Fein that was roused to ungovernable rage by the severity with which that rebellion was suppressed. And it is that party which now implacably demands the complete separation of Ireland from the British Empire. Not home rule alone, but independence, is the cry of this section of the Irish people. They will be satisfied with nothing less than an Irish re-

public, as aloof and free from England as is France or Holland.

It was the intention of the British government, in calling the Irish convention, that it should consist of 107 members, fifteen to be nominated by the crown, and the rest appointed by local groups or interests or nominated by leaders of political thought, in such a manner that every party and every shade of opinion, including the adherents of the Sinn Fein, should be represented. But in consequence of the refusal of some electoral bodies, and the failure of others, to choose delegates, the membership of the convention has not exceeded ninety-five. The body, however, does represent the best intellect, the greatest wealth, and the most important industrial interests of the island. The Sinn Feiners absolutely and unanimously declined to take any part in the convention except on the condition that it should be free to decree the complete independence of Ireland, and that the British government should publicly pledge itself to the United States and to the European powers to ratify whatever decision a majority of the convention should reach. These demands were of course impossible, and the Sinn Fein partisans remain outside the convention and even affect to ignore its existence. The convention assembled on the 25th of July, in Trinity College, Dublin, and proceeded to the unanimous and generally applauded selection of Sir Horace Plunkett as chairman and Sir Francis Hopwood as secretary. Of the latter it is said that he is regarded as an expert in the matter of colonial constitutions, having had

much to do with the creation of the Union of South Africa and the drafting of its frame of government. "His view," says a despatch from Dublin, "that the members of the convention need education in the technical side of the business is no doubt true, but their education will be rapid, for most of them have been keen students of constitution making, and some of them have shown profound acquaintance not only with colonial models, but with the classic discussions which preceded the construction of the Constitution of the United States." Like the fathers of the American constitution also, the Irish convention has voted to exclude reporters from the sessions of the convention and to prohibit the publication of anything concerning its proceedings except the official reports.

For this reason it is impossible to chronicle the doings of the convention, or to know just what is in progress. But it transpires that there is a very general feeling of hopefulness and relief. Sir Horace Plunkett, speaking at a banquet in Belfast, said that he had never heard such plain speaking and such unreserved expressions of opinion without offense given or taken, as in the convention; and he added that every member had come to the sessions with the earnest desire to develop, not Irish differences, but Irish agreements, and that already some members felt very hopeful. The mere fact that the convention sat for three days in Belfast and met with a cordial reception was regarded as encouraging. It was felt to be a great gain that Belfast, the center of unionism, should abandon its rigid attitude

of unwillingness to discuss home rule at all and welcome the convention. An apparently well-informed correspondent of the American press, writing from Dublin, speaks of "salving the fears or saving the faces of the extreme Ulster Orangemen" as the only real difficulty, but says that "it is no longer regarded as hopeless, as the moderate unionists are making impossible the position of the irreconcilables. When the proposal was first made to allow any county to exclude itself from home rule by vote, it was estimated that certainly the four north-eastern counties would stand out on a plebiscite. Now the growth of conciliatory feeling among the moderate unionists is said to be such that not more than two counties, Antrim and Down, could be relied upon to vote themselves out. As the two would be very lonely by themselves, they are likely to be all the more willing now to join in the general peace in which they can get the most handsome returns." And it is probably true that the position of Antrim and Down, if excluded from the new Ireland, would be as untenable as that of Rhode Island and North Carolina after the other states had ratified the Constitution. In another journal we read: "It is improbable that the Ulster lion will lie down with the nationalist lamb, or, if another metaphor be preferred, the nationalist wolf with the Ulster sheep. But what does really seem to be taking shape is a general desire to study seriously the scheme of home rule based on Canadian, Australian, and South African models, which would give Ireland provincial assemblies, with a cen-

tral senate representing all sections of the country, and maintaining both national and imperial cohesion." An American newspaper suggests that the difficulty can be solved by resorting to the principle of federation on the American model. "The beauty of that principle is that it is applicable to small as well as large units, and can meet just such a case as that of northeast Ulster. That part of Ireland could be made one of several divisions of the island, each of which would have a large measure of self-government under a government directing the affairs of all Ireland. Each province could have reserved to itself certain rights, similar to those which are reserved by our states, with which the general government would be forbidden to interfere. Northeast Ulster could thus be secured from religious oppression or discrimination, which it fears, and could be ruled by its Scotch-Irish majority."

The ratification of what the convention may do will take a course different from that pursued in the previous history of the making of constitutions, at least outside the British Empire. An enthusiastic journal declares that "the convention is held at the instance and upon the initiative of the ministry which is the dominant power in the British government, and which is therefore solemnly pledged before the whole world to accept and carry into execution the decree of the convention. Essentially the findings of this extraordinary assembly will have the force of a treaty; and no professed democracy can afford to treat it as a scrap of paper." But whatever moral

strength this argument may have, it is contrary to formal law. The functions of the convention are merely advisory, not legislative. It may recommend a constitution for Ireland, but that must be accepted by the government, incorporated in a bill, and put through the two houses of Parliament. And it is well to remember that the Irish problem is not alone the problem of Ireland; it is an English, an imperial, problem, too. To say nothing of commercial and trade relations, mere contiguity imposes its obligations. No scheme of government which involves the complete separation of Ireland could possibly be acceptable to a British cabinet or a House of Commons able to think even parochially. Canada might leave the empire, and so might Australia, and yet the heart of England would not be vulnerable. But an independent Ireland, with commodious harbors easily to be forced by a foreign enemy, is simply an impossibility if England is to live. The creation of a free and not very friendly Irish republic would cast England back to 1688. Ireland is England's first outpost of defense.

Yet that is just what the Sinn Feiners demand. And in spite of all hopeful opinions and reassuring symptoms of reconciliation between the other parties, the dark shadow of the separatists is upon the convention. Their intransigence may finally wreck the whole plan for Irish self-government. It cannot be doubted that the appeal of this faction has taken deep root in the heart of the masses of the

people. It enlists their imagination, their national pride, their sentiment of unity, their traditional hatred of "the Saxon." And all these feelings have been accentuated by the happenings of the last few years. It remains to be seen if there is enough statesmanship and solid good sense in the Irish people to annul the effect of this vivid and stirring propaganda. At the present moment, this appears doubtful. Sinn Feinism is spreading. The suppression of one of its newspaper organs is followed within a week by the election of one of its candidates to Parliament. This paper had just stated that Casement's rebellion was only the curtain-raiser, and that the next piece would be a tragedy in five acts. Some of the most influential London journals declare that the convention is ridiculous, because its discussions are academic and its existence useless. Others urge that the convention's plan, whatever it may be, should be submitted to the referendum of the Irish people before being enacted into law. As matters stand, this would seem suicidal. And yet, if the convention's plan is imposed on Ireland by the act of the British Parliament, it could hardly be said to rest upon the consent of the governed. Ireland has many sons and many well-wishers in these United States. They must continue to hope that some solution of this tangled problem will be found which will involve neither the disappointment of rational hopes nor the shedding of blood.

Important Articles in Current Magazines

"War, the Constitution Moulder"

The attention of our readers should be directed to a brief but suggestive article under this title, by Professor Edward S. Corwin, of Princeton, in *The New Republic* of June 9, 1917. "The concentration of power and responsibility demanded by war," he observes, "is apt to give a system grounded on the rigid maxims of republicanism a somewhat violent wrench." But there is an expansibility in our Constitution and institutions which permits this concentration without disruption. The provision which makes the President commander-in-chief is "the elastic block in the closed circle of constitutionalism; in the heat of war the powers it confers are capable of expanding tremendously, but upon the restoration of normal conditions they shrink with equal rapidity." This was proved by the experience of the Civil War and its after-effects on the constitutional system. But will it be so fifty years after the end of the present war? Professor Corwin thinks it improbable. "It requires no inordinate insight to recognize already the beginnings of what may well prove to be revolutionary developments in our system." First there is to be considered the unique lodgment of absolutely unprecedented control over commerce, industry, transportation, production, distribution, and even man-power in the hands of the executive. No sensible person raises an outcry over this. All

intelligent persons recognize it as a necessary means of meeting an emergency. But will this power and this control be wholly withdrawn when the emergency is over? Professor Corwin's answer is that for some of these enlargements of executive authority "the way had already been paved both by industrial development and political agitation before our entrance into the war had been thought of. Measures of this description look toward the permanent reshaping of both our governmental and our industrial systems, and the power upon which they rest will be relaxed only in part, if at all, with the return of peace." But this is only the beginning of the changes we may look for. For a good many years past we have been growing more and more accustomed to the idea of "government by commissions," a system under which the legislative body only enacts the broad general outlines of a statute, and leaves the working out of all its details (usually with a large measure of discretion) to executive officers, boards, or commissions. This is in derogation of the English and American plan of legislation and is distinctly a drift towards the French plan, in which the laws give the administrative officers of the state only a principle on which to proceed, rather than a body of instructions. It is also plainly a breach in the doctrine of the separation of powers. But Professor Corwin evidently thinks that this type of government, largely a matter of necessity in time of war, will gain an impetus which will carry it farther

than can be now foreseen. Another war necessity, which may have ultimate consequences, is the use of the states as aids and auxiliaries of the federal government. "An interesting possibility is thus suggested—that as the states diminish in importance in the legislative field, through the extension of congressional power, they may be afforded an opportunity to justify their continued existence in the capacity of administrative agents of the national government, and so our dual system would be gradually replaced by a federal system approximating to the German and Swiss type."

Several other possible changes are suggested, without definite prediction that they will come to pass, as, for instance, the development of permanent and useful institutions out of such unofficial emergency bodies as the Council of National Defense, the replacement (by usage rather than constitutional change) of our present type of cabinet by one more nearly resembling that in Great Britain, and the furthering of the movement for a budget system. Professor Corwin concludes: "This war has overtaken us at a peculiarly favorable moment for effecting lasting constitutional changes. For several years forces have been accumulating behind the barriers of the old Constitution, straining and weakening them at many points yet without finding adequate enlargement. Where the stress of war falls coincident with such forces, we may expect it to thrust aside accepted principles, not for the time only, but permanently. Certainly if the war is considerably prolonged, we may expect our system to emerge

from it substantially altered in numerous ways, with the result, however it may be, of postponing more radical alterations many years."

"The War Cabinet as a Constitutional Experiment"

That changes in the old and once admired constitution of England are worth the study of American citizens, and especially the radical experiment now in progress of vesting entire responsibility for the government of the country in a War Cabinet composed of only five persons, is the belief expressed by Professor Dicey, the eminent authority on constitutional law, in his article "The New English War Cabinet as a Constitutional Experiment," in the *Harvard Law Review* for June, 1917. To understand the extent of the innovation, it is necessary to consider the composition and functioning of the English Cabinet as it existed a generation ago; and for this purpose the author summarizes the masterly analysis of the subject made by Walter Bagehot in 1867. He remarks in passing that Bagehot's claim that the type as it then existed was "the best form of executive for any state which in reality enjoys a representative legislature" might have been modified if he had given more study to the constitutions of other countries. "The success with which Lincoln guided his countrymen through the perils of the Civil War hardly seems to have excited Bagehot's attention. He does not at any rate realize that, at a crisis of a nation's history, an elected but irremovable President

may exercise a salutary power hardly to be obtained by a prime minister whose official existence depends at every moment on the will or the caprice of an elected legislature." Condensing his comparison of the old and new types into a single paragraph, Professor Dicey says: "The new Cabinet does not contain anything like the whole body of high government officials or of the men who at the present moment are the parliamentary leaders of the party which commands a majority in the House of Commons, whilst the ministers who are part of the ministry, but are not part of the Cabinet, hold among them most of the high offices which till almost the end of last year entitled their holders to a seat in the Cabinet." There are at least twenty-eight ministers who are not in the Cabinet, and of these it is said: "Ministers outside the Cabinet are really, however great their fame and influence, not responsible for the general government of the country." Translated into American terminology, this amounts to saying that the twenty-eight ministers who are not in the War Cabinet have been reduced to the level practically of chief clerks or heads of bureaus. It is the belief of the author that the immediate result of this experiment in government will be the most vigorous and efficient prosecution of the war. But as to the future, he believes that it will "demand a readjustment of our governmental machinery and also of many of our governmental conventions. Some understanding must gradually be formed as to the exact relation between the members of the ministry and the

members of the Cabinet. The mutual goodwill of ministers, whether within or without the Cabinet, and the common patriotism of all British statesmen are the best guarantee that the perplexities of a new form of government will not be allowed to frustrate the success longed for by the nation of a great constitutional experiment."

Much the same line of thought is developed by Mr. H. W. Massingham, the brilliant editor of the London "Nation," in an article entitled "Lloyd George and His Government," in the *Yale Review* for July, 1917. "A country which lives under a written constitution," he says, "must have some difficulty in realizing the change which has come over the most famous of unwritten constitutions." "Deliberateness is the last word one would attach to the events which have altered the entire aspect and balance of British government. The changes have been catastrophic. They have affected every part of its structure and character, executive and administrative. The relations of the parts to one another are quite different from what they were when the war began; and were the changes to become permanent, there is not a text-book of constitutional theory and history that would not have to be rewritten." Yet it was not altogether the original impetus of the war or the development of a critical situation that precipitated these changes. Already the Cabinet was reverting to an older and apparently superseded type of authority. On the one hand, its membership was being increased, but on the other hand there was a tendency to a concentration of

power in the hands of an inner committee or junta. "This body alone shared the more intimate secrets of state, contrived the policy of the government, read the most important documents, and swayed the minds of their less perfectly informed and less personally authoritative colleagues." "More than one distinguished member of the Asquith Cabinet of 1914 left it with a deep sense of grievance that he was kept in ignorance of the most critical decisions and events." Hence the transition was not too revolutionary to what Mr. Massingham calls Lloyd George's "consulate." But he thinks that the real danger in England's political situation is that "we are in the act of abandoning the process and instinct of growth, which we have been accustomed to accept as our special contribution to the world's political thought, and of substituting a rapid empiricism. The country is asked to assume the invalidity of its most powerful and cheering discoveries in politics. It is taught to think that democracy cannot run a war, that voluntary service and co-operation cannot achieve the best output of the national energies, that parliament need not control, the country need not think, the press—though it is in a sense the begetter of our revolution—need not speak, but that the executive offices will do and discuss the things needful for salvation." He calls upon American liberalism to come to the rescue of British liberalism. No doubt the institutions called into being by the emergency of the war will be somewhat modified after its close. "But unless the American Liberal idea of the Peace

ultimately prevails with us, and replaces the more official view of a territorial peace sustained by armaments, British progress to democracy must suffer arrest, and western Europe, following her example, will take on a general mould of bureaucracy, protectionism, imperialism."

"Economic Dictatorship in War"

The *New Republic* does not often raise its voice in behalf of individual liberty. But such a note is sounded in the unsigned editorial "Economic Dictatorship in War" in the issue for May 12, 1917. Frankly recognizing the absolute necessity, in such a war as this, for complete governmental control over the processes of production, transportation, and consumption, even to the extent of telling the private citizen what work he must do, what he may eat, and what he may wear, the writer observes that "there are some optimists who see in the economic dictatorship of the present war a prelude to the future socialistic state. But it is socialistic only in the limited sense that selective conscription is democratic. Either institution, in its existing form, is adapted to the present desperate emergency. Either is capable of developing remarkable energies under the stress of a great war. And either would be likely to degenerate into a hideous instrument of tyranny if continued unchanged after the war." "These institutions, designed for war, must be so organized that they will serve efficiently their purpose, and disappear upon the return of peace.

Otherwise personal liberty is at an end." As to the economic control, efficiency is the prime requisite; and this depends upon the men selected to carry the supreme responsibility. "We shall not find them," says the *New Republic*, "in the permanent public service, civil or military, except by extraordinary accident." The only field in which to seek them is the field of private business of a developmental character. "We must draft into the public service men who have organized railways, mines, and industrial enterprises, and use them not in an advisory capacity but as responsible executives." We cannot now follow the writer through all his argument on this point. But from the point of view of free and constitutional government, his conclusions are interesting, namely, that "a war service organized by business men, according to the principles of active private business, may easily be discontinued upon the return of peace," but that "a war service with personnel selected from the permanent officials of the government would inevitably seek to perpetuate itself. The discontinuance of such a service, which would mean liberation to a business man conscripted for the purpose, would mean to the civil servant serious loss in dignity, if not in income." "The war has thrust upon us the necessity of extending the power of government over our economic life. When peace returns such extensions of power ought to lapse, and the services created for their execution ought to be disbanded. Otherwise we shall be left with a legacy of bureaucratic interference with our liberties quite revolting to our democratic traditions."

"Class Consciousness"

The *International Journal of Ethics* for April, 1917, contains a very thoughtful and suggestive paper by Professor A. K. Rogers of Yale under the caption "Class Consciousness," a term which is nowadays beginning to emerge from the field of philosophical discussion and enter that of practical politics. It includes, he says, something more than the idea of a combination of men for the furtherance of their common interests; it connotes also the disposition to find one's common interests in connection with a well-defined and exclusive group of other men, and to allow this special connection to dominate one's whole political outlook and activity. The critics of democracy used to predict that as soon as the majority discovered its power, it would turn to the business of expropriating the helpless minority. So far we have not seen this happen, but "there is a serious propaganda now on for doing what the critics held that democracy was bound to do; but the fact that it is a propaganda, and not a spontaneous movement, is significant, and is of considerable importance for an estimate of the expediency of class ideal. It is recognized now that if the relatively expropriated class is really to be united so as to make its class interest predominant, the thing can be done only by a strenuous process of education." Class affiliation has at least one advantage; it makes possible the formation of a definite program and the presentation of a clear-cut issue. But on the other hand, a political class is necessarily artificial. Its organization

cuts across the complex interests of a man's life and isolates one from out of the complex, which then is made to legislate for all the rest. And again, "closely drawn class lines inevitably represent the spirit of militancy, and warfare always carries with it certain undesirable consequences," as, the surrender of personal independence of thought, submission to party discipline, dogmatism, and intolerance, and while "a class may not care for outside help, at least it is evident that in proportion to the violence of the appeal to class consciousness, the unlikelihood of getting it will increase." So that, admitting the necessity of combination, the theory of democracy provides an alternative and better way of combination, and that is the building up of a sufficiently permanent majority by processes of education and persuasion. "Democracy, or the theory of majority rule, expressly discountenances the idea of hard and fast class lines, and encourages instead a fluidity whose aim is to give rational considerations, not selfish interests, a preponderating influence in the long run." For democracy is not the rule of *the* majority, but of *a* majority, and one that shifts and changes. And though theoretically there is no limit to the power of a majority, yet actually there is an ultimate responsibility, and a majority is restrained by the knowledge that if it does certain things it will cease to be a majority and become a minority. Therefore, "having primarily to convince a number of people sufficient to form a permanent major-

ity, the emphasis would have to be upon those rational considerations which constitute justice, instead of upon a foregone conclusion which does not even pretend to be careful of the supposed interests of other groups. If really the claim of the exploited is a claim of justice, it would seem undesirable not to keep this as much as possible in the foreground. The more the emphasis is placed on the class, the group of men affected, rather than on the nature of the particular right which is claimed, so that their interest appears to stand apart from the interest of others, or the more hostility is directed to the personal make-up of the opposing class instead of to the special privileges they are claiming,—in short, in so far as the situation is made to approximate to the irrational standards of a state of war,—the more danger there is that its larger rational aspect will be side-tracked, and a pugnacious and intolerant habit of mind developed which is prejudicial to both parties alike. To the complaint of the radical that the way of reason is too long and tedious, and that something more summary is called for, the answer is that facts do not seem to warrant the confidence that these more summary methods will succeed." Professor Rogers' conclusion therefore is that "social progress is best advanced by a political system which encourages the growth of an intelligent and convinced majority, and then puts them in a position to insure that their conviction shall be honestly and promptly carried out."

"Social Insurance and Constitutional Limitations"

Any discussion of constitutional questions by Professor Edward S. Corwin of Princeton must receive respectful consideration, even if one is not able wholly to agree with his conclusions. In his paper on "Social Insurance and Constitutional Limitations" in the *Yale Law Journal* for April, 1917, he considers the various schemes of industrial betterment, now so common under the names of "minimum wage laws," "workmen's compensation acts," and other forms of "social insurance," in the light of the constitutional guaranties of private property and rights and freedom of contract. "Recent events," he says, "make it clear that constitutional rigorism still maintains certain outposts from which it must be dislodged, if our system of constitutional limitations is to be adapted to the needs of modern complex society." The issue "is whether legislation, which is otherwise well within the police power, is to be treated as invalid because of its incidental detriment to private rights." The article is in effect a plea for such a liberalized judicial interpretation of the constitutions as shall make them substantially declare: "Private property may be taken for the public welfare, without compensation, in the exercise of the police power." Coupled with this is a warning that it must be the *public* welfare which is to be thus promoted, and not simply the welfare of an individual or a class. But the argument proceeds to show that all statutes of the kind mentioned are ultimately concerned with the welfare of the public,

however restricted their immediate benefits may appear to be. On the main subject Professor Corwin observes that "the fact remains that constitutional principles, which interpreted very adequately the needs of a prosperity resting upon individual thrift and exertion, today leave a great part of the industrial organism sprawling outside the legal shell. Such a situation clearly cannot endure nor be endured indefinitely." In conclusion the author notices certain late decisions of the United States Supreme Court, notably that sustaining the Washington workmen's compensation act, which appear to him (and to us) to go a long way toward granting the new and liberalized construction which he advocates. In fact he declares that "constitutional rigorism is at an end."

"Obligations of Democracy"

Mr. Henry T. Hunt, who knows politics practically as well as theoretically, having rendered good service in the legislative body of his state and as mayor of his city, is the author of a vigorous plea for good citizenship, under the title "Obligations of Democracy" in the *Yale Review* for April, 1917. In view of international complications as well as the progress of affairs at home, he thinks it is high time for us to take stock of our political institutions, habits, and ideas. Starting with the basic principle of our political and legal theory, that sovereignty resides in the people, that the federal and state governments are their agencies for the promotion of proper governmental ends, and political par-

ties the means of working government, he finds the results to be unintelligent, inefficient, and sometimes corrupt. But the remedy suggested is not an overhauling of the constitutions, nor the universal application of the initiative and referendum, nor the creation of a new political party. The trouble is not with the institutions, but with the people behind them. The problem is to make the great mass of voters, who are "passive partisans" voting the straight ticket without any cerebation, conscious or unconscious, give up their slothful habit of simply following the lead of the politicians, who often possess nothing more than political astuteness, and bring to bear upon the duties of their citizenship some of the zeal, sagacity, and earnestness which they devote to their business. It is still true, as it was nineteen hundred years ago, that "the children of this world are in their generation wiser than the children of light." Enlist all the children of light in the cause of good government—be their illumination that of a sun or that of a tallow candle only—and the problem of the realization of an efficient democracy is solved. "If the party organizations could be democratized," says Mr. Hunt, "if great masses of the people could be brought to use political parties as instrumentalities capable of immense benefits, our political organism would be vitalized and the best intelligence of the country would accrue to the service of

the government." But for this it is necessary that Americans of education and character should "get religion" politically speaking, re-capture a real political faith, and feel an abiding conviction that the application of their time and energy to politics would produce proportionate results. What he pleads for is "the establishment in American minds of reasonably high standards of political conduct, of faith in the efficacy of individual action, and of a vigorous objective attitude towards politics. If a movement for the furtherance of these ends could make headway, the American republic would tend to realize more nearly the sublime conception of its founders and to approach the brilliant and happy civilization which the genius, industry, and patriotism of its hundred millions justify. We are a practical people, not inclined to waste time and energy on impossible objects. If we could be convinced generally that individual political effort is reasonably worth while, and it surely is, the force of that conviction would project our immense but latent and immobilized powers against our most dangerous enemies—political indifference, materialism, and pessimism. It is time for Americans to throw off their epicene habit of hiring everything done for them from amusement to national defense and politics. It is time for them to act like men in a world of men, like citizens of a democracy in a democracy."

Book Reviews

DISTRIBUTIVE JUSTICE. *The Right and Wrong of Our Present Distribution of Wealth.* By John A. Ryan, D.D. New York: The Macmillan Company, 1916. Pp. 442. Price, \$1.50.

This volume, to quote from Dr. Ryan's preface, "represents an attempt to discuss systematically and comprehensively the justice of the processes by which the product of industry is distributed. Inasmuch as the product is actually apportioned among land-owners, capitalists, business men, and laborers, the moral aspects of the distribution are studied with reference to these four classes. While their rights and obligations form the main subject of the book, the effort is also made to propose reforms that would remove the principal defects of the present system and bring about a larger measure of justice. Many treatises have been written concerning the morality of one or other element or section of the distributive process; for example, wages, interest, monopoly, the land question; but so far as the author knows, no attempt has hitherto been made to discuss the moral aspects of the entire process in all its parts. At least, no such task has been undertaken by anyone who believes that the existing economic system is not inherently unjust," or, we may add, by one who combines the unblinking vision of the trained economist with the charity of a truly benevolent man and the ethical concepts of a priest.

But here, as in so much that is written on the subject, generosity outruns justice. Intent only on bettering the condition of the laborers, reformers forget that the state owes justice, protection, and even encouragement to the men of enterprise and courage who make possible the employment of vast numbers of men and increase the world's wealth. Not all rich men are criminals; not all prosperous persons are oppressors of the poor. Yet the tendency is always to insist on coercive measures by the state to compel the distribution of surplus wealth, and no credit is given for the countless millions of money and the untiring and beneficial labors for the betterment of their inferiors which a very great many of our leading men expend on their own voluntary initiative.

Although sternly opposed to both socialists and single taxers, Dr. Ryan would apparently favor the taxation of land to the whole extent of its increase in value, and the breaking up of exceptionally large and valuable estates by means of a supertax. He sees no injustice in prohibiting the taking of interest for the use of capital loaned. The only question is whether its suppression would be socially beneficial or socially detrimental. He thinks that "business men who face conditions of active competition have a right to all the profits that they can get, so long as they use fair business methods," including just and humane treatment of labor; and yet he advocates the legal limitation of fortunes

and the "better distribution" of large profits already accumulated by means of progressive income and inheritance taxes. He rejects the theory that labor is entitled to the whole of the product of industry, but contends that every one who is willing to work has a right to a "decent livelihood" for himself and his family. And "the elements of a decent livelihood may be summarily described as food, clothing, and housing sufficient in quantity and quality to maintain the worker in normal health, in elementary comfort, and in an environment suitable to the protection of morality and religion; sufficient provision for the future to bring elementary contentment, and security against sickness, accident, and invalidity; and sufficient opportunities of recreation, social intercourse, education, and church-membership to conserve health and strength, and to render possible in some degree the exercise of the higher faculties." To secure this, the author argues in favor of minimum wage laws, social insurance, vocational training, and organization and effort by means of labor unions. But finally he concludes that "neither just distribution, nor increased production, nor both combined, will insure a stable and satisfactory social order without a considerable change in human hearts and ideals. The rich must cease to put their faith in material things, and rise to a simpler and saner plane of living; the middle classes and the poor must give up their envy and snobbish imitation of the false and degrading standards of the opulent classes; and all must learn the elementary lesson that the path to achieve-

ments worth while leads through the field of hard and honest labor, not of lucky deals or gouging of the neighbor, and that the only life worth living is that in which one's cherished wants are few, simple, and noble."

* * *

THE CONSTITUTION OF CANADA IN ITS
HISTORY AND PRACTICAL WORKING.

By William Renwick Riddell,
LL.D., Justice of the Supreme
Court of Ontario. New Haven:
Yale University Press, 1917.

Justice Riddell, who is a frequent and welcome visitor to the United States, who is entirely familiar with our laws and institutions, as well as our traditions and our temperament, and who adorns the bench of our profoundly interesting neighbor to the north, delivered a course of four lectures at Yale on the constitution of Canada, and the Yale University Press has conferred a benefit on American readers by collecting and printing them in the volume under review. The work is not a formal treatise on the constitutional law of Canada, but a popular exposition of it in a manner highly acceptable to the non-professional student. The author is very earnest in his plea for a better understanding and a closer sympathy between the two great English-speaking peoples of the western world, and very right in thinking that a knowledge of the political institutions of the one country, on the part of citizens of the other, not perhaps profound, but something more than superficial, should lie at the base

of that understanding. His volume, delightfully written, full of erudition, and yet as easy to read as a romance, contains just the information which every well-instructed American should possess. It deals successively with the history of the Canadian constitution, with the form and contents of the written instrument, with its actual working in the conduct of government, and with a comparative view of constitutional theories and practice as between Canada and the United States. The last is naturally the most interesting part of the book. We shall not attempt an analysis of Justice Riddell's learned and illuminating discussion. The point upon which he chiefly dwells is the difference in the relation between the legislature and the courts in the two countries. The constitution of Canada contains no guaranties of individual rights, and the courts have no power to pronounce a statute invalid for the violation of those rights. The duty of the courts, he tells us, is "loyally to obey the order of the legislature." This, he naturally thinks, would appear very strange to Americans. Citizens of this republic might suppose Canada to be a "barbarous country," not fit "for a white man to live in," seeing that the courts are not secure in their jurisdiction, that the interpretation put upon statutes by the courts may be reversed by the legislature, and that any man may be deprived of his property without due process of law. And yet, "in Canada nobody is at all afraid that his property will be taken from him; it never is, in the ordinary case. Our people are honest as peoples go, and would

not for a moment support a government which did actually steal; a new government would be voted into power and the wrong righted." Still an American lawyer may be forgiven for cherishing the belief that written guaranties are not without their efficacy, and that when a man's property is taken from him and bestowed upon another, it is but cold comfort to tell him that he may assist in voting a new government into power. Does this ever happen in Canada? Let Justice Riddell himself answer. "In Ontario," he says, "a certain company claimed to have fulfilled all the conditions necessary under the statute to entitle it to the grant of certain mineral rights. The government disputed the right of the company, and made a sale of these rights to another company. An action was brought, but, pending the action, legislation was passed declaring the latter company entitled. The action came on for trial before myself, and I declined to pass explicitly upon the question whether the requirements of the statute had been fulfilled by the original company, as I considered this quite immaterial. I held that, even supposing the first-named company owned the land, the legislature had the power to take it away and give it to another." In the course of his decision in this case, the author tells us, he made the following remark: "If it be that the plaintiffs acquired any rights, the legislature had the power to take them away. The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body."

FORM AND FUNCTIONS OF AMERICAN GOVERNMENT. By Thomas Harrison Reed. Yonkers-on-Hudson: World Book Company, 1917.

This is a practical and informative description of the form of government subsisting in the United States, and of the functions which government performs and the manner in which its various activities are carried on, in the country at large, in the states, and in the cities and towns. The author says in his preface: "This book is the result of nine years' experience in teaching government and a lifelong interest in politics. It is intended primarily for that great majority of high-school pupils who go no farther on the road of formal education, and aims to deal with the principles of governmental organization and activity in such a way as to be a suitable basis for the most thorough high-school course in preparation for citizenship. It leaves the author's hands with the cherished hope that it may help to make better citizens and better government." The illustrations with which the book is plentifully supplied will help in making it useful and instructive. The application of graphic methods to the teaching of political science should make a special appeal to the mind of youth. Among the praiseworthy features of the volume we notice a clear and strong argument for the short ballot, an interesting account of the party system in politics and its working, a good view of the growth of executive leadership over against parliamentary initiative and responsibility, and a really excellent account of the system

of county, town, and township government, and with the latter, a plea for greater autonomy in the government of cities and for their deliverance from the power of the boss and also from the ineptitude of rustic legislators, including an interesting history of the commission form of urban government. A few inexcusable errors have been noticed. In speaking of the ordinary writ with which a civil action is begun, it is said (page 162) that "failure to obey a summons renders one liable to arrest and punishment." It is stated that Rhode Island and North Carolina are the only states in which the governor does not possess the veto power. This is not true of Rhode Island. The governor of that state was given the veto power by a constitutional amendment in 1909. We are not satisfied with the author's discussion of the judicial system. His remarks on the appointment and tenure of judges, their independence, and their duty and attitude towards unconstitutional legislation, appear half-hearted, not very illuminating, and not likely to be convincing to youthful minds. Neither do we think it very safe to tell high-school pupils that the initiative, referendum, and recall "are simply the logical fulfillment of the theory of democracy; they are open to attack, but only as democracy itself is." But the chief defect of the work is that it does not contain nearly enough instruction upon the nature, importance, and value of written constitutions. This should form the corner-stone of the edifice. Instead, almost the entire attention is devoted to the practical working of government

and institutions. It would probably be unjust to suspect Professor Reed of personal estrangement from the American doctrine of the written constitution as the charter of liberties, though he does not fail to take his fling at the "due process" clause. His attitude towards constitutions is perhaps re-

flected in his remark that the Constitution of the United States was the product of a "conservative reaction" and that "when this tendency had spent itself, the great movement for democracy, world wide and ages old, resumed its onward march."

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By THE NATIONAL ASSOCIATION FOR CONSTITUTIONAL GOVERNMENT

The National Association for Constitutional Government was formed for the purpose of preserving the representative institutions established by the founders of the Republic and of maintaining the guarantees embodied in the Constitution of the United States. The specific objects of the Association are:

1. To oppose the tendency towards class legislation, the unnecessary extension of public function, the costly and dangerous multiplication of public offices, the exploitation of private wealth by political agencies, and its distribution for class or sectional advantage.

2. To condemn the oppression of business enterprise,—the vitalizing energy without which national prosperity is impossible; the introduction into our legal system of ideas which past experience has tested and repudiated, such as the Initiative, the Compulsory Referendum, and the Recall, in place of the constitutional system; the frequent and radical alteration of the fundamental law, especially by mere majorities; and schemes of governmental change in general subversive of our republican form of political organization.

3. To assist in the dissemination of knowledge regarding theories of government and their practical effects; in extending a comprehension of the distinctive principles upon which our political institutions are founded; and in creating a higher type of American patriotism through loyalty to those principles.

4. To study the defects in the administration of law and the means by which social justice and efficiency may be more promptly and certainly realized in harmony with the distinctive principles upon which our government is based.

5. To preserve the integrity and authority of our courts; respect for and obedience to the law, as the only security for life, liberty, and property; and above all, the permanence of the principle that this Republic is "a government of laws and not of men."

Tinkering With the Constitution¹

By Joseph R. Long

Professor of Law, Washington and Lee University

There has recently been formed a society, with headquarters in Brooklyn, having for its object the securing of an amendment to the federal constitution. The society calls itself a "Committee on the Federal Constitution," and the amendment which they advocate is one providing easier modes of amendment than those prescribed in Article V. They propose to "carry on a campaign of education in favor of this measure through the daily and periodical press, book and pamphlet publication, letter and circular, pulpit and platform." Among the members of this committee are men of national reputation and of the highest rank in the intellectual world. When men of this character unite upon such an undertaking, the movement is entitled to at least respectful consideration. And this is not the first nor the only effort that has been made to accomplish the same object. During the recent period of unrest through which we have been passing, in which the courts, the Constitution, and our fundamental political institutions generally, have been subjected to the attacks of the muckrakers, a number of resolutions have been introduced in Congress proposing similar amendments. Such an amendment was introduced by Senator La Follette in 1912, and its adoption has been urged upon Congress by the legislature of Wisconsin. And even since the adop-

tion of the Sixteenth and Seventeenth Amendments in the single year 1913, these "gateway" amendments are being proposed.

The theory, of course, upon which this radical change in our fundamental law is being urged is that the Constitution does not now express the real will of the people, and that it is practically unamendable in the modes now provided. As stated in the published platform of the Brooklyn committee, "the people of the United States have not control over their fundamental law at the present time, save in a minor degree. The consequence is, our institutions do not reflect the popular will, but in reality other forces over which we have only a measure of control. Our community life, therefore, is not what it would be had we the power to shape it in our own way." We propose in this paper briefly to inquire whether this contention is true. The satisfactory solution of the problem will require some examination of the history of proposed amendments to the Constitution.

When the Constitution was submitted to the states in 1787, its framers did not regard their work as final but contemplated that amendments would be made from time to time. Accordingly they provided in Article V a mode, or rather two modes, of amendment. Their expectation that amendments would be proposed in the future has been amply realized. While the Constitution was still before the people

¹Reprinted from the Yale Law Journal of May, 1915, by permission of the author and of the Yale Law Journal Company.

for adoption, numerous proposals for amendments were made by the conventions of seven of the ratifying states and in the first session of Congress in 1789 nearly two hundred such proposals were introduced. Since that time resolutions proposing amendments have been introduced in one or more of the sessions of practically every Congress to the present time. During the first century of the Constitution, that is, up to the close of the fiftieth Congress in March, 1889, over sixteen hundred such resolutions were introduced in the two houses of Congress. The number of amendments proposed in the several congresses presents a wide range of variation. Thus, in the case of one Congress at least (the thirty-fourth) it appears that not a single resolution to amend was introduced, while in the sessions of the thirty-ninth Congress, during the troubled years 1865-1867, nearly two hundred such proposals were made. In the fifty-second Congress seventy-three amendments were proposed, and in more recent times, during the second session of the sixty-second Congress (December 4, 1911-August 26, 1912) five amendments were proposed in the Senate and twenty-eight in the House, a total of thirty-three. And during the first session of the sixty-third Congress (April 7, 1913-December 1, 1913) twelve amendments were proposed in the Senate and forty in the House, or fifty-two in all. Of the forty amendments proposed in the House, six were proposed by a single representative, Mr. Hobson of Alabama. With Congress composed of about 525 members, every one of whom

is at liberty to introduce proposals to amend the Constitution, it is not surprising that several such proposals are made at every session of Congress. It is estimated that about 30,000 bills are introduced during each session, and the wonder is not that proposals to amend the Constitution have been so numerous, but rather that they have been so few.

Of the hundreds of amendments that have been introduced in the two houses of Congress, only twenty-one have received the required two-thirds vote of both houses and been submitted to the states, and of the twenty-one only seventeen have been adopted. Twelve amendments were proposed by the first Congress in 1789, and of these ten were adopted by 1791 as the first ten amendments. Then followed the Eleventh (1798), Twelfth (1804), Thirteenth (1865), Fourteenth (1868), Fifteenth (1870), Sixteenth (1913), and Seventeenth (1913) Amendments. Of the rejected amendments two were proposed by the first Congress. One of these, relating to the apportionment of representatives, failed of adoption by the ratification of only one state. The other related to the compensation of members. An amendment proposed in 1810 provided that if any citizen of the United States should accept any title of nobility from any foreign power, or, without the consent of Congress, accept any present or office from any foreign power, he should cease to be a citizen of the United States and be incapable of holding any office thereunder. This amendment likewise came within one ratification of adoption, and was for some years actually supposed

to be a part of the Constitution. In 1861, there was proposed by Mr. Corwin of Ohio an amendment prohibiting an amendment abolishing slavery. This amendment was referred to with approval by President Lincoln in his first inaugural address and was submitted to the states. It was ratified by the legislatures of Ohio and Maryland and by a convention in Illinois, as the Thirteenth Amendment, but was then lost sight of in the confusion of war. The Thirteenth Amendment afterwards adopted was of precisely opposite import.

From the foregoing summary it appears that the Constitution has been amended only eight times since its adoption in 1789. The first ten amendments, which were all adopted at one time and immediately after the Constitution went into effect, may be regarded as practically a part of the original Constitution. From the adoption of the Twelfth Amendment in 1804 until 1913, a period of 109 years, covering substantially the entire history of the United States as a nation, there were but three amendments, and these were adopted only as a result of civil war and practically by force of arms. Moreover, for nearly forty years after the adoption of the war amendments, no proposed amendment had succeeded even in passing both houses of Congress.

In the light of these facts it is not surprising that many thoughtful men deemed the Constitution practically unamendable under normal conditions. Thus, Professor Charles A. Beard (*"American Government and Politics,"* p. 62) says: "The extraordinary ma-

jorities required for the initiation and ratification of amendments have resulted in making it practically impossible to amend the Constitution under ordinary circumstances, and it must be admitted that only the war power in the hands of the federal government secured the passage of the great clauses relating to slavery and civil rights." So also, President Wilson about thirty years ago (*"Congressional Government,"* p. 242) wrote: "It would seem that no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of amendment erected in Article V. That must be a tremendous movement which can sway two-thirds of each house of Congress and the people of three-fourths of the states."

These expressions are fairly representative of the opinion of students of constitutional history a few years ago. But in 1895 came the "Income Tax Case" in which the Supreme Court held that the income tax law of 1894 was unconstitutional. No decision since the "Legal Tender Cases" has attracted such general attention, and probably none since the "Dred Scott Case" has been so widely condemned. It is the one case which every soap-box orator, fulminating against the courts and the Constitution, can certainly name, though probably very few even of the more intelligent citizens could now state exactly what was decided in that famous case. The decision may have been incorrect; certainly competent critics have thought that in it a low water mark was reached in the history of the Supreme Court. At any rate it

took hold of the popular imagination. About this time the trusts were rising into prominence. Enormous fortunes were being quickly made by a favored few and attracting the envious attention of the unfortunate and discontented. And if incomes were practically untaxable by the federal government, the rich would escape their just share of taxation. With the poor the income tax is popular, for it does not affect them. Consequently the imposition of such a tax, since it would fall exclusively upon the rich or well-to-do, appealed strongly to the great mass of the population, who were willing enough to impose a tax which they would not be called upon to pay. A respectable sentiment was therefore developed in favor of an amendment to the Constitution to authorize the imposition of an income tax, and before the close of the year in which the decision was rendered (1895), resolutions were introduced in both houses of Congress to authorize the laying of an income tax without apportionment. From time to time other resolutions to the same end were offered, and in July, 1909, the Sixteenth Amendment, as we now have it, was passed by both houses of Congress and submitted to the states. On February 25, 1913, Secretary of State Knox certified that it had been ratified by the required number of states and was a part of the Constitution. The amendment was thus adopted within about three and one-half years after it was proposed by Congress, and so for the first time in forty-three years the Constitution was amended, and for the first time in over

a century it was amended except as a result of civil war.

It is not the purpose of this paper to discuss the merits of the Sixteenth Amendment. On this point opinions may differ. The supreme significance of the amendment is that its adoption proved that the Constitution could be peaceably amended if the people really so desired. Forty years before, the overwhelming sentiment of the country was against slavery, and even without the war, it seems certain that slavery would sooner or later have been abolished either by an amendment to the federal Constitution or by the individual action of the slaveholding states. So also, when the sentiment of the country was again aroused, this time in favor of the income tax, the necessary amendment was adopted with reasonable promptness. It would seem that three and one-half years is a sufficiently short time in which to make a change in our fundamental law. But scarcely had the country recovered from its surprise at learning that the Constitution was not in fact unamendable, when it was called on to witness an even more rapid change. The Seventeenth Amendment, providing for the election of Senators by the people, passed the Senate on June 12, 1911, and the House on May 13, 1912, on which day it was submitted by Congress to the states. It received the ratification of the last necessary state on May 9, 1913, and on May 31, Secretary Bryan certified that it had become a part of the Constitution. Thus the Seventeenth Amendment was ratified in four days less than one year from the day on which it was

proposed, and in less than four years two independent and unrelated amendments were added to the Constitution.

Now that it has been so convincingly shown that the Constitution can be peaceably amended in the constitutional mode, we may from a somewhat different point of view re-examine the earlier history of proposed amendments to ascertain why amendments have so generally failed in the past. Time and again the fact that about 2,000 amendments had been proposed, with only fifteen adoptions, has been urged to prove that the Constitution is practically unamendable. However, upon a study of these proposals, it is found that they relate to a comparatively small number of different subjects. Slavery alone, and the questions arising out of its abolition, have been the subject of more than 500 of the amendments proposed. More than this number have been proposed relating to the executive, especially in connection with the length of the presidential term and the question of re-eligibility. Probably 100 proposals were made that Senators should be elected by direct vote of the people before this proposition was finally embodied in the Seventeenth Amendment. Thus it appears that, while hundreds of amendments have been proposed, many of them are simple repetitions, and as a matter of fact, the number of independent propositions of consequence has been small.

Again, when we consider the character of the amendments proposed, we find that they frequently do not represent any real and permanent public sentiment, but embody merely the notion of some individual congressman

or a temporary popular emotion that passes with the exciting cause. Many of the amendments proposed are of the most trivial character or relate to matters of detail far better left to legislation. Such are provisions fixing the salary of the President, or defining the jurisdiction of the inferior federal courts. More than once it has been proposed to amend the preamble so as to include some recognition of God. What are we to think also of a proposition made by a representative to change the name of the United States to "America"? More serious perhaps is Representative Victor Berger's proposal to abolish the Senate. The character of the amendments proposed is naturally largely determined by the trend of public sentiment at the time, and often popular fads find expression in resolutions to amend the Constitution. Of late there has been a disposition to make the impeachment of judges easier, and even to introduce into the federal system the recall of judicial decisions, or the referendum. Before these innovations have been given an adequate trial by the states, it is proposed to adopt them for the national government. Most of the proposed amendments die in the committees to which they are referred. Very few have sufficient merit to come to a vote.

As just suggested, the proposals to amend the Constitution reflect in their nature the temper of the times. At certain periods, owing to political or economic conditions, the Constitution attracts to an unusual degree the attention of the people, and amendments are proposed to meet the supposed needs of the day. The most conspicuous in-

stance of this is found in the amendments relating to slavery. Very few amendments on this subject were introduced prior to 1860, but from the opening of the second session of the thirty-sixth Congress in December, 1860, they were offered in great numbers, mainly in the vain hope of averting a conflict between the sections. About 200 resolutions affecting slavery were proposed during this session, including the Corwin amendment prohibiting federal interference therewith. The final result of this activity was the adoption of the three war amendments. The Eleventh Amendment was occasioned by the decision in *Chisholm vs. Georgia*, that a state might be sued in a federal court by a citizen of another state. Again, the deadlock in the presidential election of 1800 led to numerous proposals to change the mode of selecting the President, resulting finally in the adoption of the Twelfth Amendment. In most cases, none of the amendments suggested to meet needs supposed at the time to be imperative have been adopted. Generally it has been found after the temporary conditions of unrest have disappeared, that the proposed amendments were not needed and that the Constitution has been adequate as it stood. Thus, after the "salary grabs" by Congress in 1816 and 1873, when Congress increased its own compensation, amendments were introduced providing that such increases should not take effect until after the succeeding election of representatives. These, however, were not adopted, simpler expedients being resorted to. In the first instance the offending representatives were not re-

elected, and in the second case Congress itself took the hint and repealed the objectionable law. We may note, however, that an amendment to this effect was one of the twelve proposed by the first Congress, but was rejected by the states. The veto power of the President has quite frequently been the subject of proposed amendments. The frequent use of this power by Presidents Jackson and Tyler led to a number of attempts to curb the power. On other occasions, the agitation has been for the enlargement of the power, especially by enabling the President to veto certain items in a bill, notably in appropriation bills, while approving the rest. Again, upon the failure of the impeachment proceedings against Judge Chase in 1805, John Randolph, in his disappointment, immediately introduced a resolution for the removal of judges on the joint address of both houses of Congress, and the next year re-introduced the same amendment. In the next six years, nine other amendments for the removal of judges were proposed. Then the excitement on this line subsided, and except for several such proposals scattered over a long period of years, no such agitation has occurred until the recent notorious attack upon the judiciary began. It now seems that the recent removal of one judge by impeachment and the disciplining of several others have taken the point out of the proposition to amend the Constitution in this particular. The amendments proposed illustrate what Carl Schurz described as "the dangerous tendency of that impulsive statesmanship which will resort to permanent changes in the constitution of the

state in order to accomplish temporary objects."

The federal Constitution has so far been a fairly stable document. It has never been revised as a whole, and has been changed by amendment in only a few particulars. It has happily escaped the fate that has befallen the constitutions of the states. Not only are they subject to constant change, but they have long since ceased to be constitutions in a true sense. Instead of embodying broad general propositions of fundamental permanent law, they now exhibit the prolixity of a code and consist largely of mere legislation. No one now entertains any particular respect for a state constitution. It has little more dignity than an ordinary act of the legislature. In Oregon, according to Judge Moore of the Oregon Supreme Court, "it requires no more effort nor any greater care to amend a clause of the Constitution than it does to enact, alter, or repeal a statute." In similar strain, the Attorney General of Oklahoma once declared in a public address that it was easier to amend the Constitution of that state than to amend a statute of the state legislature and took less time. If this be correct, it would seem that the degradation of the state constitution could no further go. The Constitution of the United States is justly regarded as the greatest instrument of government ever ordained by man. For more than a century it stood almost unchanged. Some of the greatest judges in history have interpreted and applied its provisions, and in their decisions have developed an unequalled system of constitutional law. It is not true, as is often asserted,

that Marshall and his associates and successors have strained the Constitution and wrested it from its original character and made a new constitution. The Constitution, in essentials, means today what it meant one hundred years ago. The great principles of human liberty which it embodies are eternal. New conditions may arise calling for new or enlarged applications of these principles, but with the exception of a few matters covered by the three war amendments, no important addition to the Constitution has been made in a century and none has been imperatively needed.

A constitution, to be respected as fundamental law, must possess in a reasonable degree the quality of permanence. Of course it should not be incapable altogether of being changed to meet new conditions, but just as each new exception weakens the force of a rule, so new amendments tend to impair the dignity of a constitution. Any unnecessary amendment is a distinct injury, and wherever the object sought can be accomplished in some other way, the constitution ought not to be amended. Thus if Congress has the power to do by legislation what the amendment is intended to accomplish, it is both useless and harmful to alter the fundamental law for this purpose. For example, amendments prescribing the details of the jurisdiction of the inferior federal courts, which have been proposed, are objectionable on this ground, since the jurisdiction of these courts is already entirely subject to the control of Congress. So also of proposed amendments fixing the salary of the President or the compensation of

members of Congress. Amendments of this character are subject to the further objection that they relate to details. To admit such amendments in a constitution which, from its nature, deals in generals, not in details, would cause it soon to partake of the prolixity of a legal code. Equally objectionable on this ground are amendments to accomplish results which may be accomplished by state action, of which conspicuous instances are found in the numerous amendments relating to woman's suffrage, prohibition, and marriage and divorce. This class of amendments may be even more objectionable in that they impair the sovereignty of the states without any commensurate gain.

No one would contend that an amendment embodying the real will of the people should not be added to the Constitution, provided the same object cannot readily be attained in some other way. The trouble is that the people have rarely come to any general agreement as to what changes they wished made in the Constitution. Probably no matters have been more frequently the subjects of proposed amendments than the mode of electing the President and the presidential term. These topics seem to be of perennial interest. It has been stated that no question gave the framers of the Constitution so much trouble as the question of the method of choosing the executive. The indirect method finally selected by the convention worked smoothly only so long as Washington consented to serve as President, and even before the electoral vote in the election of 1796 had been counted, an amendment

changing the mode of voting was proposed. The question was not settled by the adoption of the Twelfth Amendment in 1804. Since then many amendments have been proposed on this subject. Up to 1889, thirty-seven amendments were proposed for the election of the President by the direct vote of the people, the first of these having been offered in 1826. But the abolition of the present mode of electing the President seems not probable in the near future. No other plan yet proposed has met with general approval, and the fact that the Constitution is already practically changed in this respect and the President elected by popular vote seems to satisfy the people. Amendments to change the mode of election are still being proposed, but the people are not interested in the subject. Of late much more attention has been paid to the presidential term and the question of re-eligibility. Up to 1889, about 125 amendments had been submitted on these subjects, and others are added at practically every session of Congress. The favorite proposition is to fix the term at six years, usually with a provision that the President shall not be eligible to re-election. But even on these questions the people have not made up their minds, or rather they seem to prefer to determine these questions as to any particular President upon the merits of the individual case. If they think the term of a particular executive too short, they reelect him for another four years. If they think he ought not to be reelected, they, by their vote, declare him ineligible. And perhaps it is best to leave the matter as it stands. Certainly no formal prohibi-

tion of a third term has yet been necessary.

Another favorite amendment is that giving the President power to veto a single section of a bill which he otherwise approves, particularly to veto items in appropriation bills. There seems to be much in this proposition to commend it, but the subject does not appeal to the people. It excites no popular interest and will therefore probably not soon be adopted. And there is high authority against it. Mr. Taft, in his speech at the University of Virginia in January, 1915, said: "While it would be useful for the executive to have the power of partial veto, I am not entirely sure that it would be a safe provision. It would greatly enlarge the influence of the President, already large enough. I am inclined to think it is better to trust to the action of the people in condemning the party which becomes responsible for 'riders' than to give in such a powerful instrument a temptation to its sinister use by a President eager for continued political success." In the same address Mr. Taft favored a limitation of the President's tenure of office to a single term of seven years.

The two proposed amendments now most prominently before the public are those relating to woman suffrage and national prohibition. As both these subjects appeal strongly to large numbers of persons, the proposition to amend the Constitution along these lines has aroused unusual interest. So great is the interest in prohibition especially that it is not impossible that the prohibition amendment may be ultimately adopted. In the writer's judgment

neither amendment would be proper. Without any reference to the merits of the two questions in the abstract, it would seem that there is no occasion to amend the Constitution to secure either of the objects aimed at, for both are attainable without a constitutional amendment. Any state that desires woman suffrage can adopt it for itself whenever it wishes to do so. No national aid is required. Moreover, the franchise is a matter which belongs peculiarly to the states, and unless it is desired to impair the autonomy of the states and centralize the government even more than has yet been done, a provision on woman suffrage has no place in the federal constitution. The experiments with the suffrage question in the Fourteenth and Fifteenth Amendments were not so successful as to invite other adventures in that field. The practical nullification of these provisions meets with general satisfaction, and their formal repeal has been more than once proposed. The first woman suffrage amendment, it may be remarked, was likewise a product of the reconstruction period, having been introduced in 1866. Since then numerous amendments on this subject have been proposed, and on January 12, 1915, such an amendment was rejected by the House of Representatives by a vote of 204 to 174.

The first prohibition amendment was proposed in 1876, but no special interest was taken in the subject until quite recently, such amendments being quite frequently proposed at present. On December 22, 1914, Mr. Hobson's resolution proposing an amendment for nationwide prohibition received a major-

ity of 197 to 189 votes. The strength shown in this vote indicates the hold which the prohibition sentiment has gained, and it would not be surprising to see this amendment adopted. However, it is unnecessary, and for that reason at least is objectionable. As in the case of woman suffrage, each state may adopt prohibition for itself, as many have done, and reenforced by acts of Congress state prohibition can readily be made effective, if, indeed, any prohibition law could be enforced. But even if it be desired to control the matter by a national law, Congress already has power to enact the necessary legislation. Through its control of interstate commerce and the postal service, and by the exercise of the taxing power if necessary, Congress can put an end to the liquor traffic just as it has suppressed lotteries and oleomargarine disguised as butter and regulated the trade in foods and drugs. The prohibition of the transportation of liquor in interstate commerce or by mail, and the refusal to carry liquor advertisements or orders or newspapers containing such advertisements in the mails, and also the imposition of a prohibitive tax on the manufacture and sale of liquor, would soon put an end to the business. This, at any rate, seems as far as the federal government should go in the matter. National prohibition was vigorously denounced by Mr. Taft in a recent speech in Boston, in which he said: "It would revolutionize the national government. It would put on the shoulders of the government the duty of sweeping the doorsteps of every home in the land. If national prohibition legislation is

passed, local government would be destroyed. And when you destroy local government, you destroy one of the things which go to make for a healthy condition of national government. National prohibition is not enforceable; it is a confession on the part of the state governments of inability to control and regulate their own especial business and duty."

Another proposed amendment somewhat akin to the foregoing is the amendment to authorize a national marriage and divorce law. At present, of course, Congress has no power to legislate on the subject of marriage and divorce, and the extent of the divorce evil is a matter of general notoriety. Also it is well known that marriage may be held valid in one state and void in another, thus giving rise to various complications as to inheritance and other questions. But public attention has been especially directed to the evil of the practice of obtaining divorces on a pretended residence in a state other than the domicile of the plaintiff, as in the case of many of the divorces obtained at Reno and in other jurisdictions having loose divorce laws. It is likely that this particular branch of the divorce evil is of far less consequence than is commonly supposed, that such divorces constitute a small part of the total number of divorces granted, and that the divorce evil is due far less to differences of state laws than to other causes. But even admitting the evil of the so-called "migratory divorces," no national legislation is necessary to put an end to them. As the law now stands, no state is compelled to recognize a divorce obtained in a state where the

plaintiff was not bona fide domiciled. This has been expressly held by the Supreme Court in several cases. That such divorces are tolerated and the parties permitted to marry again without being prosecuted for bigamy, is simply because public sentiment sanctions such marriages and no one cares enough for good morals to have the parties prosecuted. Further, marriage is recognized as the very foundation of society, and this matter is too vital to be surrendered by the states. A national law would have to operate uniformly over the entire country, and a majority in Congress could easily force upon the southern states, where negroes are numerous, the intermarriage of whites and blacks, by the votes of representatives from states where there are few negroes. So also, California might be compelled to recognize the intermarriage of whites and Chinese by the votes of representatives from other states where there are practically no Chinese. An amendment prohibiting polygamy has been several times proposed in order to enable the federal government to suppress polygamy in states where it is sanctioned or tolerated. To this amendment there would seem to be no serious objection, but probably there is not sufficient general interest in the subject to secure its adoption.

It might have been expected that the almost uniform failure of proposed amendments to secure adoption would lead to frequent attempts to simplify the mode of amendment. Such, however, has not been the case. The first proposal to change the method of amendment was made by the Rhode

Island convention which ratified the Constitution in 1790. This proposal was to make amendment more difficult by providing that no amendment should be made without the consent of eleven of the original states. No effort to make amendment easier seems to have been made until 1864 and again in 1873, in which years resolutions reducing the vote required for adoption were introduced. These resolutions never came to a vote in Congress. Of late several such resolutions have been proposed, as already mentioned above. Prior to the adoption of the Sixteenth and Seventeenth Amendments there may have appeared to be some necessity for an amendment providing an easier method of amendment, but that there was in fact no such necessity experience has now abundantly shown. And in the judgment of the writer such an amendment is not only not necessary, but dangerous. No amendment embodies so much potential danger as an amendment making the Constitution so easily amended that it may be changed by a minority, or even by a majority, of the people to suit every passing fancy. The Constitution would soon be reduced to practically the level of the constitutions of the states if a very easy mode of amendment were adopted. At one time, as we have seen, thoughtful men were of opinion that the Constitution was practically unamendable and that a simpler mode of amendment was necessary unless the Constitution were to remain unchanged except by judicial amendment and practical evasions. There is no longer reasonable ground for any such opinion. The people have shown that they can

promptly amend their Constitution by doing it.

There is no great difficulty in securing the adoption of any amendment that a decided majority of the people of the United States really want, and certainly no other amendment should be added. It has been assumed by the advocates of some of the proposals for simplifying the method of amendment that a majority ought to determine the organic law, but this view ignores one of the fundamental objects of a constitution, that is, the protection of the minority against the majority. This is amply secured by the requirements of Article V. It is impossible to amend the Constitution without sufficient deliberation to enable the people to form an intelligent opinion on the subject. The constitutional safeguards of our liberties cannot be overthrown at the passing whim of a fickle majority. It is fortunate indeed that it was not possible to put through some of the amendments aimed at the judiciary during the recent wave of insanity on that subject that is only now subsiding.

It has more than once been pointed out that a small minority of the voters of the country, by being aptly distributed in the smaller states, may defeat an amendment favored by a great majority of the people. It might with equal propriety be suggested that the proper distribution of a few votes might sometimes change the result of a presidential election. But such a possibility is inevitable unless state lines are to be wiped out and the country treated as a unit. Moreover, it is none the less true that it is theoretically possible to adopt an amendment to the

Constitution against the wishes of the twelve most populous states, having an aggregate population of more than half the population of the United States. That is, an amendment might be adopted by a minority of the voters of the country. But juggling of this sort constitutes no argument.

The prompt adoption of the Sixteenth and Seventeenth Amendments proves that the Constitution can be amended within a reasonable time even under normal conditions. It is true that these amendments were first proposed long before they were adopted, but this lapse of time was not because the process of amendment is difficult, but because time is inevitably required to develop a sentiment in favor of a proposed change however simple the mode of adoption may be. The Sixteenth Amendment was adopted eighteen years after the decision in the "Income Tax Case," which, in normal times, is as promptly as could be expected. Even the Spanish War did not so embarrass the government as to make the need of an income tax seem urgent. Great nations think slowly, and taxation is a dull subject. The development of a sentiment for the Seventeenth Amendment was naturally not so rapid; the question involved was far more complex. The election of senators by popular vote was first proposed in 1826, but for nearly fifty years the proposition excited little interest. Previous to 1872, nine resolutions on the subject were introduced, but about that time the subject took a strong hold upon the people, and in the next seventeen years the change was proposed about thirty times. In the first ses-

sion of the fifty-second Congress, twenty-five resolutions on the subject were introduced. The legislatures of several states recommended the amendment. Finally, under the pressure of increasing popular demand, the amendment was several times passed by the House, and at last, in 1911, passed the Senate also. Within one year of its final passage by the House (May 13, 1912) it was ratified by the last necessary state, and on May 31, 1913, declared in force. Considering the nature of the question it would seem that in this case also the amendment was adopted with reasonable promptness. When the ratification of the required three-fourths of the states can be obtained within twelve months, there is little room to complain. In words once used by Mr. Justice Holmes, "a state cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English chancery, with all deliberate speed." If this remark is apt when applied to one of the states, it is even more so when applied to the United States.

The great lesson of the war amendments is that amendments should not be made hastily or in the height of popular excitement. Already it has been proposed to repeal the Fifteenth Amendment and certain portions of the Fourteenth. They have never really been operative. The first section of the Fourteenth Amendment is a most important and meritorious addition to the Constitution, though open to criticism in respect to its provision relating to citizenship. But that this amendment should have merit is a happy accident.

It did not accomplish the purpose for which it was forced upon the states, but, in a way of which its authors doubtless never dreamed, it has had a tremendous and on the whole a beneficial effect. It was intended to secure certain rights and privileges to the negro; it failed of this purpose, but it revolutionized the relations of the state and the national governments. It gave the Supreme Court the veto power over all state legislation and greatly increased its appellate jurisdiction over the proceedings of the state courts. Thus in their efforts, under stress of passion, to promote, as they supposed, the interests of the negro, the authors of this amendment unwittingly effected a revolution in our government. Yet they did not accomplish what they aimed at.

It is a serious matter to amend our fundamental law. As in the case of the Fourteenth Amendment, momentous consequences may lurk unsuspected in amendments innocent on their face. The burden is upon those who claim that the Constitution is inadequate or outgrown to show wherein this is true. What amendments would they propose? Would the amendments proposed by one critic be acceptable to another? We suspect that most of the changes advocated by the various critics have already been proposed time and again in Congress without attracting serious attention. Such changes could not be secured however simple the mode of amendment. As already shown, changes really desired by the great body of the people may be made by the present method without serious difficulty. The Constitution is not per-

fect. The result of compromise in the first instance, it is not the embodiment of a philosophic scheme of government, but a working instrument of practical statesmanship. In the hands of the Supreme Court, it has been admirably fitted to the needs of successive genera-

tions of our people. When necessary, or when the people really desire it, it can be amended. The present mode of amendment assures its stability while permitting natural evolution; a simpler mode might work its destruction.

The Organization of Liberty and of Government¹

By Nicholas Murray Butler
President of Columbia University

This is an inspiring moment in the history of democracy. When those principles upon which this ancient commonwealth was founded and upon which our nation has risen to its place in the world are struggling for their very existence on the field of battle, you are here engaged in restudying and perhaps in remodeling some of their foundations. To a lover of democracy and to one who is optimistic enough to believe that whatever be the immediate signs of the moment, its permanent triumph and extension are secure, there can be nothing more striking than the task upon which you are engaged. You have been summoned by the citizens of Massachusetts to restudy not the superstructure, not the ornamentation, not the minor details, but the very foundation of her form of government; to see how far ancient principles still maintain themselves, how far men of an open mind may suggest their readjustment to meet new needs and new conditions; and to take account of the changing social and eco-

nomic order that confronts us all around the world. For nothing is more certain than that in this very war democracy is experiencing a new birth. It is coming to have a new and clearer understanding of what its principles are and of how those principles are to be applied, and it is going to spread its beneficent opportunity over millions and tens of millions of human beings who have never known it before.

We all know the history of our federal constitutional convention. We know the history of the convention and the national assembly of France. We have seen the making and the remaking of constitutions in more than two score of our sister states, and we have watched constitutions made not by, but for, the peoples of several European nations. May it not be said that those of us who are convinced democrats and believers in constitutional government have come to a substantial agreement upon three great points, and that these three points will shortly be included almost beyond peradventure in the document which is to issue from the forthcoming constitutional convention of the new democracy of Russia?

¹An address delivered before the Massachusetts Constitutional Convention; reprinted by permission of the author.

In the first place, it is the essence of a sound constitution that the method for its amendment shall be such as to put within the reach of the people opportunity, after adequate consideration and discussion, to readjust it from time to time to new needs and for the solution of new problems. We are sometimes apt to overlook the formula for constitutional amendment, but I think on reflection we should all agree that it goes to the very essence of a constitution that it is to be a document of advance and of progress and of life, and not merely a fixed formula for a given year and a given generation.

And then, second, are we not agreed that there must be in the constitution, if it is to last and if the people are to be really free, an adequate organization of liberty which is based on our familiar bills of rights, and which marks off the sphere in which the individual, either alone or in company with his fellows, may freely undertake those various activities which give him opportunity for development, for self-expression, for gaining an honest competence, and for its enjoyment free from the interference or arbitrary act of government? And do we not know that in that organization of liberty and sphere of free action has been the great contribution of our American nation to the world? It is because we marked off a field of liberty which may not be invaded either by executive or by legislature, and put it under the protection of an independent judiciary, that we have been able to build up the nation that confronts and surrounds us. That organization of liberty, sufficiently definite to meet the needs of the people,

sufficiently elastic to keep its limits from solidifying into harmful boundaries,—that organization of liberty is the essence surely of a sound constitution, whether it be for nation or for commonwealth.

And then there is the organization of government itself. Curious enough, this is the only aspect of constitution-making that has attracted the attention of certain of the European nations. If I am not mistaken, the constitution of France and the constitution of Italy, at this moment, are simply organizations of government and nothing more. They set up a frame of government, but they do not set it up as over against a field of liberty, nor do they attempt to protect the one from the other. Therefore they leave the individual citizen in his undertaking, in his employment, in his activity, at the mercy of a passing phase of opinion or a temporary majority, or perhaps even of a prejudice that will pass away. There is no great constitution but our own and that of the German Empire in which any reference is made to the organization of liberty—no written constitution. And in the constitution of the German Empire, left as it is without judicial protection and under the mercy of an autocratic form of government, this counts for little more than a mere formula or recital of words.

You are concerned at this moment, I take it, very largely with studying the organization and framework of government. It is mere everyday knowledge to say that the framework of our government has come down to us over a hundred and forty or fifty

years, that it has done reasonably well, but that here and there it has shown defects of working which men everywhere are sincerely trying to improve by this device or by that. I suppose that, taking the nations of the world at large, the political experience of modern man would tell us that one of our greatest mistakes has been the too sharp separation of the executive and the legislative branches of the government. We are constantly trying, now by following a device familiar in this country, now by following a device familiar in another, now by throwing out some new idea of our own, to overcome such practical difficulties as the history of the last century has developed in that regard. We are aiming to bring about a relationship between executive and legislature, now by the suggestion of an executive budget, now by giving cabinet ministers

seats in the legislative houses, now by this device and now by that, through which one of the weak points, or one of the weaker points, that history has disclosed in the framework of our government may be overcome. It is fortunate that about all this there is no suspicion of partisanship or party advantage or party feeling. I know from the printed records of this convention that you are here as loyal, patriotic, high-minded citizens of an ancient commonwealth, determined on studying and solving the problems of the moment in the light of patriotic duty, the wisdom of experience and the needs of today and tomorrow. That the outcome of your deliberations and your suggestions will be fortunate to Massachusetts, of advantage to the nation, and useful to democracy everywhere, I am perfectly certain.

Progressive Legislation, the Constitution, and the Supreme Court

By the Editor

Two specious and dangerous fallacies are abroad in the land. One is that the Constitution of the United States is an insuperable obstacle to the enactment of progressive legislation designed for the betterment of social and industrial conditions, and should therefore be radically amended. The other is that the Supreme Court of the United States, possessing the power to pass upon the constitutional validity of acts of Congress and (in some cases) of the state legislatures, is disposed to thwart the will of the people by withholding its sanction from laws of that character and designed for that purpose. For example, the author of a recently published book called "The New Democracy" affirms that "the greatest merit, and the greatest defect, of the Constitution is that it has survived. It might be well if the American people would recast their Constitution every generation." The Constitution, he says, "is like an old rambling mansion, which cannot be lighted, and in the dark places of which our enemies secrete themselves." It is "a stiff, unyielding, and formidable (because venerable) obstacle to a true democracy, and a strong bulwark of plutocracy." In the course of a political address not long ago in a western city it was said: "We cannot accomplish much under our government, which is clumsy and impossible, almost hopeless. Under it we cannot pass any law of consequence interfering with vested rights. The

Constitution, old, musty, and antiquated, is a barrier, with the Supreme Court all powerful." A lawyer of some eminence, addressing a state bar association, lately remarked "In proportion as the judges are removed from contact with the people, so we find their opinions adverse to the best interests of human welfare. Notably is this so with the federal courts." The brilliant editor of "The New Republic" (March 31, 1917), in speaking of a legislative and administrative program which, he thinks, will grow out of the vastly changed conditions following the close of the present great war, and which will involve "an ever-increasing scope of governmental control over private business and over the standards of life and labor," and which "will call for a thorough revision of many prevailing conceptions of property and private liberty," declares that "this whole program is imperiled so long as the Supreme Court retains its present power over social legislation. There are only two ways of avoiding it. Either the appointments to the Supreme Court must be frankly based upon the political and social outlook of the nominees, or the Supreme Court must be shorn of its present power of upsetting social legislation on the ground that it is inconsistent with due process. Can it be doubted that the latter is the safer and sounder course?"

Now the purpose of this paper is to refute these two intimately connected

and entirely false notions by means of a very condensed review of some fifty or more decisions of the Supreme Court rendered within the last fifteen years, in which the constitutional validity of federal and state laws of the character mentioned has been *sustained*. No other argument will be presented. A mere recital of the decisions will suffice. They speak for themselves.

But first it is necessary to remark that most of the laws for establishing social justice, benefiting the wage-earners, preventing fraud, and otherwise furthering the progressive program, have been enacted under what is called the "police power." Courts have very seldom attempted a definition of this great power, because it is in its nature elusive and not to be confined within sharp boundaries. But what is important for our present purpose is to call attention to the great change in both the popular and the juridical conceptions of it. A generation ago it was understood to be limited to certain specific objects. Today it has no real limitations. As late as 1885, the general agreement of the courts was to the effect that the police power, in any strict and constitutional sense, was limited to the preservation or protection of three particular objects, the public safety, the public health, and the public morals. But in 1907, the Supreme Court declared that it may be exercised for the general well-being of the community, and that it embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations for the public health, morals, or safety. In the same year, in another case, Mr. Justice Har-

lan said: "Except as restrained by its own fundamental law or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restrained, *and so far as this court is concerned*, may by legislation provide not only for the health, morals, and safety of its people, but for the common good, as involved in the well-being, peace, happiness, and prosperity of the people." In 1911, the court said: "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." And in this present year (1917) the court said: "While this court has refrained from any attempt to define with precision the limits of the police power, yet *its disposition is to favor the validity of laws* relating to matters completely within the territory of the state enacting them, and *it so reluctantly disagrees with the local legislature*, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority *only when it is plain and palpable* that it has no real or substantial relation to the public safety, health, morals, or to the general welfare." It seems difficult even to imagine a statute which should have no real or substantial relation to such broad objects as the "public convenience" or the "general welfare." But

if this be true, it is not too much to affirm that the Supreme Court has removed all shackles from the police power.

Next it is necessary to call attention to two decisions rendered by the Supreme Court before the period at which our review begins, because they are of fundamental importance and will help to explain much that follows. One is the case of *Munn vs. Illinois*, decided in 1876. The point decided was that proprietors of grain elevators which are declared by law to be public warehouses are among those whose business is "affected with a public interest," so that the state may regulate their rates and charges. It has been said that this decision "signalized the recognition of collectivism, as distinguished from individualism, by the courts. It did not affect public health, safety, or morals, but involved a broad effectuation of the public good." At any rate, it laid the foundation for all legislative and municipal control over public utilities for the public benefit. The other case is that of *Knowlton vs. Moore* (1900). Here the court held that no constitutional objection to a graduated inheritance tax can be drawn from the provision of the Constitution that "taxes shall be uniform throughout the United States." For the uniformity in taxation required by this clause is not an intrinsic or personal uniformity, but geographical only, and the phrase is synonymous with the expression "to operate generally throughout the United States." This decision opened the way for all progressive income and inheritance taxes.

Coming now to the main object of this paper, we shall only remind the reader that cases turning upon questions of constitutional law which reach the United States Supreme Court are usually of considerable intrinsic importance, and of much greater importance in view of their far-reaching effects as precedents. Hence, almost invariably, they are thoroughly argued by eminent lawyers, the attack upon the statute under fire being directed from every conceivable angle and the defense being equally spirited. Moreover, they are very searchingly examined by all the justices before a decision is rendered. For the sake of economizing space, we shall not give citations to the cases mentioned. But they are all in the possession of the writer, and will be cheerfully furnished to anyone who wishes to verify the accuracy of the statements here made.

In 1903, the Supreme Court ruled that the federal Constitution is not infringed by the Kansas statute making it a criminal offense for a contractor for a public work to permit or require an employee to perform labor upon that work in excess of eight hours each day. And in the following year the constitutionality of the Sherman anti-trust law was sustained, with what far-reaching consequences it is not necessary here to relate. And states may also enact laws against monopolies and combinations in restraint of trade, without unwarrantably abridging the freedom of contract secured by the fourteenth amendment, as was decided in 1905 in the case of the Kansas statute on that subject. In 1906, the

court found nothing unconstitutional in the statute of North Carolina, then recently enacted, to break up and punish dealing in "futures" and the business of "bucket shops." In 1908, there is a decision that rights under the federal Constitution are not infringed by the limitation of the hours of labor of women employed in laundries to ten hours a day which is made by the statute in Oregon. And in the next year the court sustained the validity of the Elkins act, under which the commission by corporate officers, acting within the scope of their employment, of criminal violations of the provisions of that act against giving rebates is imputed to the corporation, and the corporation subjected to criminal prosecution therefor. In 1910, it was decided that a state has the right to protect its forest lands from depredation, and an act punishing the cutting of timber on state lands is valid under the police power and not unconstitutional, even though it imposes the penalty of double damages upon one whose trespass was casual and involuntary. In the same year, a decision was given that nothing in the federal Constitution denies to a state the right to enact a law for the registration and licensing of physicians, and a decision that the Michigan "sales-in-bulk" law, intended to prevent merchants from defrauding their creditors by selling out their whole stock in trade to one purchaser in a single transaction, is a valid exercise of the police power and does not deny due process of law or the equal protection of the laws.

Important decisions were rendered in 1911. One concerned the Arkansas

statute prescribing a minimum of three brakemen for freight trains of more than twenty-five cars, regardless of any equipment with automatic couplers or air brakes. This was held not forbidden by the provisions of the Constitution. It laid the foundation for all subsequent "full crew" laws. Another statute of the same state abolished the "fellow servant" rule as to corporations operating railroads within the state; and it was held that this does not deny to such a corporation the equal protection of the laws because the statute does not also apply to individual employers. In the same year the court sustained the act of Congress by which an interstate carrier, voluntarily receiving property for transportation from a point in one state to a point in another state, is made liable to the holder of the bill of lading for a loss anywhere on the route, with a right of recovery over against the carrier actually causing the loss. And a ruling was made that the levy and collection under a state statute (such as those in Kansas, Nebraska, and Oklahoma) from every bank existing under the state laws of an assessment based upon average daily deposits, for the purpose of creating a depositors' guaranty fund, to secure the full repayment of deposits in case any such bank becomes insolvent, is a valid exercise of the police power and not contrary to the Constitution.

In 1912, against attacks on various constitutional grounds, the court upheld the federal employers' liability act, which regulates the relations of interstate railway carriers and their employees, by abrogating the "fellow servant"

rule, extending the carrier's liability to cases of death, and restricting the defenses of contributory negligence and assumption of risk. The same year it was decided that there is no ground to complain of a deprivation of rights under the national Constitution because a state law (Mississippi) requires railroads to settle claims for lost or damaged freight, shipped over their lines between two points within the state, within sixty days after notice of claim, under a penalty. In 1913, a decision was given that the West Virginia statute fixing the maximum fare for passengers on railroads at two cents per mile is not open to objection on constitutional grounds. Likewise it was ruled, in that year, that requiring entries in coal mines, where drivers are required to drive with mine cars, to have an unobstructed space of at least two feet in width outside the rails(as is done by a statute of Indiana) is a valid exercise of the police power; and so also is a state law prohibiting the employment of children under sixteen years of age in various hazardous occupations. In the interests of the public health, it was also decided that a municipal ordinance is not open to constitutional objection which forbids the bringing into the city and the sale of milk, unless from tuberculin-tested cows, under penalty of the confiscation and immediate destruction of the milk; and the court refused to interfere on constitutional grounds with the Chicago ordinance fixing the weight of the standard loaf of bread. In this year also, the Hepburn act, which makes it unlawful for any railroad company to transport in interstate commerce any

article which it may own or in which it may have an interest, except such as may be necessary for use in its business (intended to break up the practice of railroad companies owning or leasing coal mines and hauling their own product), was declared to be a valid exercise of the congressional power to regulate commerce. In another case decided in 1913, the court had under consideration the so-called Mann "white slave act" of Congress, forbidding the transportation in interstate commerce of women and girls for immoral purposes. It was urged that the attempt to link this statute with the commerce power was nothing but a subterfuge, that it was really an attempt to interfere with the police power of the states in respect to regulating the morals of their citizens, and that it was an invasion of the reserved powers of the states, contrary to the tenth amendment, and not within the competence of Congress. But the court unanimously sustained the act.

The following year, 1914, witnessed no less than ten important decisions of the kind under review. As against various allegations of unconstitutionality, the court had no hesitation in sustaining the New York law requiring railway companies to pay their employees at least twice a month, and the Virginia statute which forbids employers engaged in mining or manufacturing to pay the wages of their workmen in "store orders" or in any kind of orders not purporting on their face to be redeemable in lawful money, and the Massachusetts act prohibiting the employment of women for more than ten hours in any one day, or more than

fifty-six hours a week, in any manufacturing or mechanical establishment, and the Georgia law requiring railway locomotives to be equipped with electric headlights of a certain minimum power. Recognizing the fact "that the business of mining coal is attended with dangers that render it the proper subject of regulation by the states in the exercise of the police power," the court sustained the Pennsylvania statute providing a method of fixing the width of the barrier pillar which must be left between adjoining coal properties, so that it may be sufficient to safeguard the employees of either mine in case the other should be abandoned and allowed to fill with water. It was also decided that a state law against monopolies and combinations in restraint of trade is not in violation of the federal Constitution, even in its application to a combination which is shown to have benefited instead of injuring the public; and that nothing in the Constitution prevents a state from imposing a license tax on the business of selling oleomargarine, though it puts that article in a class by itself and discriminates between it and butter; and prohibiting the sale by itinerant vendors of "any drug, nostrum, ointment, and application of any kind intended for the treatment of disease or injury," as is done by a law in Louisiana, does not violate the equal protection clause or the due process clause of the fourteenth amendment, though the sale of such articles by other persons is permitted. Pennsylvania passed a very peculiar game law, which prohibited the killing of any wild bird or animal by any unnaturalized foreign-

born resident of the state, except "in defense of person or property," and to that end made it unlawful for any such person to own or possess a shotgun or rifle. But the court saw no constitutional objection to this law. In this year also, the court said that a business may be so far affected with a public interest as to permit legislative regulation of its rates or charges, although no public trust is imposed upon the property, and although the public may not have a legal right to demand and receive service, and that the business of fire insurance is of this character, and sustained a Kansas statute regulating the rates charged for it. Some lawyers have thought that this was pushing the doctrine of legislative control on account of "public interest" to the extreme verge, if not over it, and this seems to have been the opinion of the three justices who dissented.

The protection of labor and the promotion of the public welfare were several times before the court in 1915. It was held that the New York act providing that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of the state of New York must be given the preference, is not in violation of constitutional provisions. So the California statute forbidding the employment of women in certain specified establishments or occupations for more than eight hours in one day, or forty-eight hours in one week, was held to be in no way contrary to the Constitution of the United States. And the same de-

cision was made as to the Ohio "run-of-mine" or "anti-screen" law, under which coal miners whose compensation is fixed on the basis of ton or other weight must be paid according to the total of all the coal contained in the mine car in which it has been removed from the mine, provided no greater percentage of dirt and other impurities shall be contained than what is ascertained to be unavoidable by the state industrial commission. There was no difficulty in sustaining the validity of the Illinois law forbidding the sale of food preservatives containing boric acid; and if a state chooses (as Ohio did) to create a board of censorship for moving-picture films, which is to examine them before any public production, and to pass or approve only such films as are in its judgment of a moral or educational character, or such as are amusing and harmless, this is a proper exercise of the police power, and not an abridgement of the right of free speech and publication.

The year 1916 was likewise marked by several important decisions. A statute of Florida requires every able-bodied male person between the ages of twenty-one and forty-five to perform six days' labor upon the highways of his county in every year, when summoned to do so, or to provide an able-bodied substitute, or else pay a tax of \$3 to the overseer of roads, and makes the failure to do so a punishable misdemeanor. It was urged that such conscripted labor was equivalent to "involuntary servitude" and also that it deprived the individual of his liberty and property without due process of law. But the court thought otherwise,

and sustained the validity of the statute. Parenthetically it may be remarked that this decision is of greater immediate importance than may appear on its face. For if the physical powers of the individual may be thus impressed into the service of the state for the purpose of road-making, can there be any doubt of the constitutional authority to conscript him for military service in time of war? To resume, it was also decided by the court in this year that there is nothing in the federal Constitution to prevent a state from declaring by law that the emission of dense smoke in cities and populous neighborhoods is a nuisance and subject to restraint as such; and a law or ordinance on the subject is not to be held unconstitutional because of its harshness or severity (if it is not purely arbitrary) or because of its effects upon business interests, or because it may require the discontinuance of the use of property, or put the occupant to large expense in complying with the terms of the law. And it is not inconsistent with due process of law that railway companies having yards or terminals in cities should be forbidden by a state statute to conduct switching operations across public crossings in such cities unless with a "full switching crew," consisting of an engineer, fireman, foreman, and three helpers.

In this year also the income tax act of 1913 was fully sustained by the unanimous judgment of the court, as against a most vigorous and searching attack directed against almost every one of its provisions. In another case, the court had under consideration the amendment to the pure food and drug

act, which makes contraband, so far as regards interstate commerce, as being misbranded, any drugs which bear or contain in or upon the packages or labels false and fraudulent statements as to their therapeutic or curative properties. It was urged that this was not a proper exercise of the power to regulate commerce, but was nothing more or less than a police regulation in the interest of the public health, and that, in that character, it was beyond the constitutional power of Congress and an encroachment upon the reserved rights of the states. But the court sustained the act. In still another case, the court was called upon to consider the Harrison "anti-narcotic law." This act establishes a nation-wide and most severe system for controlling the production, importation, sale, dispensing, possession, and distribution of certain habit-forming drugs, particularly opium and its salts and derivatives. On the argument of the case it was claimed on the one side and admitted on the other that the act could be sustained only in the character of a revenue law, and counsel for the government stated that "this act was passed with two others in order to carry out the international opium convention, that Congress gave it the appearance of a taxing measure in order to give it a coating of constitutionality, but that it really was a police measure that strained all the powers of the legislature." In this case the court was not obliged to pronounce directly upon its constitutionality, but it adopted a certain construction of the statute in order to escape "the conclusion that Con-

gress meant to strain its powers almost if not quite to the breaking point."

In 1917, the Court decided that Congress did not exceed its constitutional power under the commerce clause in enacting the Webb-Kenyon law, which forbids the interstate shipment or transportation of intoxicating liquor into a "dry" state. This is the act which puts the sting into state prohibitory laws and makes them really prohibit. In this year also there were several interesting decisions in favor of state laws enacted under the police power, as, for instance, that sustaining the validity of an Indiana statute requiring locomotives on trains operated within the state to be equipped with headlights of not less than 1,500 candle power. As designed to protect the people against fraud, the court sustained the validity of the "blue sky" laws of Ohio, Michigan, and South Dakota. These are statutes intended to prevent the flotation of wildcat companies of all kinds and the promotion of fraudulent corporate enterprises. The laws prohibit persons from dealing in corporate stocks and bonds without first obtaining a license from a specified state officer, which is granted only upon an application setting forth certain information respecting the applicant's business, with references establishing his good repute. Touching an altogether different subject, it was held that statutes which prohibit the sale as "ice cream" of a product containing less than a fixed percentage of butter fat are not unconstitutional, although the ice cream of commerce is not iced or frozen cream but is a frozen confec-

tion, varying in composition, and under some formulas may be made without either cream or milk. Again, the court declared that it is lawful and within the police power of a state to forbid the erection of any billboard or signboard larger than a certain prescribed size in cities or towns in any residential block, unless with the written consent of a majority of the owners of frontage on both sides of the street. This decision is very interesting, and may be said to take up a very advanced position, because of late years there has been much agitation in the legislatures and the courts over the "billboard nuisance," though the almost unanimous tendency has been to regard statutes and ordinances on the subject as an unconstitutional invasion of private property rights. The reason is that no tenable objection has been shown against the right of an owner to use his property for billboard advertising (or outdoor advertising generally) except the hideous ugliness of such structures in cities and their defacement of the landscape along the countryside. But though it has been tried again and again, very few courts have felt free to hold that the preservation of natural beauty, or the prevention of offenses against the aesthetic sense of the community, was within the police power. Nor does the Supreme Court rest its decision on this ground, but on the ground of the "safety, morality, health, and decency of the community." None the less the decision will be taken as the strongest possible authority for legislative control of the whole subject of advertising signs.

This year was also signalized by the

rendition of favorable decisions on a group of workmen's - compensation laws. The law in New York on this subject, enacted in 1914, abolishes all the rules of the common law as to negligence and responsibility in industrial accidents, classifies forty-two certain occupations as hazardous, and imposes upon employers a liability to make compensation for disabling or fatal accidental personal injuries to employees incurred in the course of their work, without regard to the question whose fault caused the accident (except where the employee intentionally brought it about or was drunk while at work), graduates the compensation to be paid according to a prescribed scale, based on the loss of earning power, or, in case of death, according to the dependency of the surviving wife or children, and requires the employers to secure the payment of compensation for which they may become liable either by a system of insurance or by furnishing proof of their financial ability and depositing securities. The court unanimously decided that there was nothing in all this that violated the fourteenth amendment or unwarrantably limited freedom of contract, but that the statute was a valid exercise of the police power of the state. It was declared that the compensation of injured workmen was a matter in which "the public has a direct interest," since, if the health, safety, or welfare of the individual is sacrificed, "the state must suffer." And it was held to be right to impose liability upon the employer in such cases, even though he was not in any way to blame for the accident, "on grounds of natural justice."

The Iowa workmen's-compensation act differs from that in New York because it permits an employer, when an accident has happened, to reject the compulsory compensation features of it and stand a suit for damages, in other words, to take his chances with a jury. But in this event it provides that he cannot set up in defense of the suit that the employee assumed the risks of his employment, or that the injury was caused by the fault or negligence of a co-employee, or even that it was brought about by the employee's own carelessness, unless willful or the result of intoxication. But again the court decided unanimously that there was nothing in the Constitution of the United States to render such legislation invalid. The corresponding statute in the state of Washington presents a different aspect. It abolishes all private rights of action at law for industrial accidents in hazardous occupations, and substitutes a system of compensation to injured workmen and their dependents out of a public fund, which is established and maintained out of contributions required to be made by all employers in those occupations in proportion to the hazards of each class of occupation. Each employer must make his contribution to the fund without regard to any wrongful act on his part, and irrespective of the question whether or not any of his own employees have been injured. It results, as the court pointed out, that an employer who runs his own factory or mill with such prudence and such careful regard for the safety of the men that no accident ever happens in it will yet have to contribute periodically

to the compensation of the injured employees of his negligent competitors. Yet a majority of the court decided that this was not unconstitutional or beyond the police power of the state. To reach this conclusion, however, it was necessary to take the position that the scheme of the statute was partly a regulation of industry, partly a plan for industrial pensions to which certain classes of employers might be required to contribute, and partly an "occupation tax" on certain forms of industry. Four of the judges thought that this was going too far and felt compelled to dissent. In yet another case, it was held that there is no constitutional objection to the Kansas statute for the protection of employees engaged in hazardous occupations, which requires that dangerous machinery shall be safeguarded, and which makes the failure of the employer to do so an act of negligence on his part, for which he may be sued if injury results, and which also provides that, in actions brought under the statute, the doctrines of contributory negligence and assumption of risk and the fellow-servant rule shall not bar a recovery, and that the burden of proof shall be upon the employer to show a compliance with the act. At about the same time there was a decision that the Oregon hours-of-service law, prohibiting the employment of workmen in mills, factories, or manufacturing establishments for more than ten hours a day, provided that employees may work for not more than three extra hours a day at extra wages, does not transcend constitutional limitations.

In this year also the court, by a five to four decision, sustained the validity of the so-called "Adamson law." The country being confronted with the imminent danger of a complete interruption of interstate commerce by a threatened general strike of railway employees, Congress passed this act, which established a permanent eight-hour standard for a day's work by such employees, and made a temporary regulation of the wages to be paid them pending the investigation and report of a commission to examine into the situation. This was held to be a competent exercise of the power of Congress to regulate interstate commerce. The decision has been the subject of much hostile criticism. On the one hand, the act has been denounced as "a mere arbitrary bestowal of millions by way of wages upon employees, to the injury

not only of the employer but of the public, upon whom the burden must necessarily fall." On the other hand, it has been no less bitterly assailed by the labor unions, because of the clear implication from the decision (even the clear statement in some of the opinions of the different justices) that it opens the door for Congress to fix maximum as well as minimum wages in such cases, to forbid or prevent strikes by workmen engaged in interstate commerce, and to require the compulsory arbitration of labor disputes. But perhaps the most important doctrine which emerges is that, in cases of such great emergency, the paramount consideration is the welfare of the general public, and that all private rights and interests may by law be subordinated to its adequate protection.

Democracy, True and False

"To make the world safe for democracy"—that is the ultimate purpose of the most devastating war in the annals of time. Not for ourselves alone have we entered the struggle, not selfishly to secure for our own land freedom to perpetuate in peace our ideals of popular government, but to aid in liberating the whole earth from the tyrannous hands of autocracy and despotism, so that wherever the sun shines the peoples of the world may be forever free to establish and maintain their own governments and control their own destinies. And that for which we fight is not a political formula nor a system of government. There are

kings among our allies, and their monarchies will not crumble in the reconstruction of the world. The name given to the titular head of the state is of no importance. That for which the world is to be made safe is not the framework of the system under which a people rule and are ruled. It is deeper than that. It is the spirit in which they build their institutions. It is their freedom and their obligation; their individual right and their civic duty; their equality before the law and their submission to the law; their ideal of organized society and their moral consciousness—in short, it is that which makes government the most powerful

agency in advancing civilization and promoting human welfare, a blessing, not a blighting curse.

We in America are much more truly a democracy at the present moment than ever before in our history. It is not that our institutions are more free, our participation in government more direct, or our individual liberties wider. On the contrary, our liberties are abridged, while our burdens are greater. Our spheres of personal freedom are circumscribed. We are more strictly governed, by more numerous laws, in a greater variety of ways, than at any previous period. But we know that this is not only justifiable but necessary. It is temporary and the occasion for it will pass. Hence we submit to it cheerfully, nay, even approve and encourage it, because we know it does not impinge upon our essential democracy. The chain is cast about our free institutions, not to strangle but to save them. But we are now more truly a democracy than ever before because we are stirred by a common impulse, motivated by a just and universal wrath, thrilled by an exalting patriotism which flows like flame throughout our million hearts, we are bending our energies to a common task, and sustaining upon our shoulders a burden which, thank God, is common to us all. We have developed something better than a multicolored class consciousness; at last we have achieved a national consciousness. Millions of our young men have been set apart for war. There is no distinction of race or creed or caste or previous estate. It is a democratic army, a true brotherhood of arms. Eight or ten millions

of us have lent our money to the nation. It is the people, the whole American people, who have poured out their savings at the nation's need. This is a democracy of service. We are to learn the duty of frugality, of plain and simple living, a lesson which must be brought home, and is even now coming home, to every American household. It may prove a regenerating influence of untold good. But since all must share it alike, is it not a democracy of endurance? Not only the wealth but the genius of the country is enlisted in the country's service. The offices of government are thronged with the volunteers. They are the heads of great business enterprises, great executives, great administrators, great organizers, great inventors. And among them likewise there are thousands of men and women of every lesser degree of capacity. What they have in common is the true spirit of democracy. Forsaking personal concerns, they give their time and labor to the service of the state, but they do it (this is the test) not at the state's command, but from devotion, and not that the state may be glorified, but "to make the world safe for democracy." And side by side with them stands the recognized leader of union labor, who highly declares: "I propose to do a man's duty in helping to make this war the last war of this world. All my energies will be laid at the feet of America and of our allies, to do what I can towards the establishment of democracy."

But after the war, what then? How will it fare with the body and soul of democracy when all the world returns

to the ways of peace, when abundance replaces want, when the high tension of excitement is relaxed, when the impulse to service is spent and passes with the need of service, and when the millions of men come back from the fields of death to the paths of industry? How will it be with America then? For we must be sure that we shall get what we have been fighting for, and that the democracy which prevails among us then shall have been worth the fight. It is not too soon to look forward to that day, be it near or remote. No time can be inopportune for a serious study of that ideal which is the very object of the contest. The true principles of democratic government must be kept steadily before our eyes. They cannot be too often rehearsed.

To see deeply into this question it is very necessary to recall to mind the successive waves of agitation against our existing constitutional and political systems which rose to menacing heights in the few years preceding the entrance of America into the war. Our most fundamental institutions were challenged. Extremely radical changes were advocated. Men cried: "Between constitutionalism and democracy there is a great gulf fixed which cannot be bridged." A redistribution of wealth was demanded. It was proposed to consign the Constitution to the ash-heap. The doctrine of natural and personal rights was denounced as a silly notion unaccountably surviving from the eighteenth century. There were clamorous voices of discontent and change. They are not stilled even now, and it would be folly to suppose

that we shall not hear them lifted again in even more raucous and insistent cries. And in truth our American democracy has not come into the fullness of its inheritance. It was not working smoothly. Let us see then what is true democracy—not the name or the symbol, but the essence of the thing itself—and how we can best make it real for ourselves and for all the world.

First of all, it is not autocracy. There must be an end of imperialism. But tyrannical power may be exercised by the group or the multitude as well as by the solitary ruler. Imperialism is not the attribute of kings alone; it is a human tendency. It is manifested in the competition for power, if power is to be used for oppression. Its spirit is shown in the struggle for personal or class aggrandizement at the expense of others. If democracy is to be not merely a form of government, but also a state of society (and it cannot else fulfill its mission) it must not be perverted to the use of any portion of the community at the cost of any other. If American democracy is worth preserving, it can only be accomplished by strongly discouraging everything that tends to arrange society in strata, to open chasms between different orders of the people, or to array class against class. Class favoritism of every kind is unsocial and opposed to the ideals of American liberty. Whatever operates to lay burdens upon some which are not shared in their degree by all alike, or, on the other hand, to exempt favored bodies of men or occupations from the restrictions which hedge others about, is hateful to true democ-

racy, and it is immaterial whether it is accomplished by an act of legislation or by misdirected efforts at social reform. It should need no argument to show that the mission of true democracy is not to create new special privileges, but to bring about a new birth of mutual respect and human kindness, not to magnify industrial disputes but to soften the exacerbated feelings from which they spring, not to accentuate, but to reconcile, conflicting interests. Only as we grasp the essential solidarity of society, and cease to divide it into fractions, shall we be able to realize the best promise of our national life. Anciently, to be called a citizen of Rome was in itself a title of honor. We should make American citizenship something to be proud of. But our pride in it should be communal, not individual. It should be a tie to bind us all together in bonds of mutual respect and kindly interest. Nor should we forget that envy, hatred, and greed corrode like acids, and that any destructive force let loose within the body of society impairs the strength and vitality, not alone of the part against which it is immediately directed, but of the whole. Something more is needed than constitutions and laws. Democracy is not a set of formulas; it is an indwelling spirit. The attempt to legislate the millennium is not only futile, but it is wrong, in so far as it seeks to substitute governmental force for those human qualities by which alone the regeneration of society can be accomplished. The social uplift is not to be effected by the club of the policeman. For that we need a broadening of education, a higher standard of morals, a

wiser philanthropy. We need conscience, sympathy, charity, tolerance, and human kindness. We need for such a task the force of good example and unselfish devotion to the public service. For, essentially, we cannot lift men up; we can only help them up.

Again, democracy does not mean the triumph of the "bolshéviki" or the rule of the proletarians. Unhappy Russia is at hand to prove the point. The convulsions of revolution and of anarchy which rend that mighty land, so lately delivered from despotism, are an object-lesson of fearful and solemn import. Yet here at home, and very lately, there were great numbers of people who appeared to think that democracy meant mediocrity, and who were demanding that the powers of government should be confided exclusively to the "plain people" or the "common people." Perhaps these terms do not admit of very exact definition; but the evident intention was to exclude all the professional politicians and all the plutocrats (if such there be), but also all the men of genius or talent, all those who are prominent in the leadership of industry, finance, commerce, education, science, or the arts. Not only the idle rich man and the trade baron must go, but also the philosopher and poet, not only the boss but the bishop. And the thesis is that the remnant of the people, as thus obtained, would possess a keener sense of justice, be animated by a greater passion for righteousness, and at the same time display a higher capacity for the administration of government than are now vested in the people as an unexpurgated whole. Is this true?

Ask Russia. Besides, what becomes of the democracy of the Constitution and of Lincoln if any part of the people be excluded from the government of the whole? If, upon the foundations of our present life, we are to rear the superstructure of a new and more perfect social order, the task is not for weaklings, nor for men of narrow outlook and mean imagination. The builders of that house must possess constructive ability, and clear intelligence, and sympathy both broad and deep, and a conviction of justice, and insight, and vision.

It is precisely a democracy which is most in need of a strong written constitution. This is the sole contrivance which the enlightenment of mankind has been able to devise for the salvation of democracy from itself, the ultimate achievement, politically speaking, of the long upward struggle from barbarism to civilization. True, we no longer regard government as a necessary evil. To us it is a beneficent agency for the promotion of the common welfare. But the inherent power of government to crush and to destroy is what it always has been. It cannot be effectively kept in check by faith alone nor by counsels of moderation, but only by the categorical negative of the Constitution. The aim of popular government is the accomplishment of the will of the majority. The aim of constitutional government is to protect the minority in their essential rights. It is only under a constitutional democracy that these two purposes can be reconciled and government become the efficient servant of all and the master of none. But of

course constitutionalism does not mean stagnation. Human rights are put within the protection of constitutions to be vitalized, not to be embalmed. Nor is there anything in our system of government to check initiative or repress the widest play of individual thought and impulse. Once the fundamental principles are guaranteed, a democracy should welcome and encourage the free contest of differing currents of opinion and of opposing schools of political thought. But beware of tampering with those fundamentals! We Americans are an excitable and temperamental people, but somewhat lacking in poise. We are full of nervous energy, enterprising, and fond of novelty. Our business life shows the utmost alertness, an ever-present readiness to break with the traditions of the past, to discard whatever we may suspect of having outlasted its usefulness, to adapt our methods to the very latest developments, to act upon the faintest hint of what the future may bring forth. But human rights and liberties are not commodities. Up-to-date constitution making is not without its dangers. What we are too prone to forget is that the life of the nation is not a series of disconnected phases or a succession of impulses. It is continuous, having its roots in the past and its full fruition in the future. However its aspects may change, it is essentially an unbroken unit, like the life of an individual. True, the condition of life is continuous adaptation to the environment; but this adaptation is to be effected by continuous growth, not by surgery. No one attempts to fashion an ideal body for a human being by

first dismembering him and then re-assembling his fragments in a fairer form. But he who casts upon the operating table the constitution and the laws of a nation had best handle his scalpel with exceeding care, lest, after he has moulded its form into more gracious lines, it should be found that those impalpable things which make the soul of the nation—truth, justice, and liberty—have returned into the void from whence they came.

If democracy means anything at all it means equality. But equality does not insure liberty. Grant universal suffrage and abolish all hereditary privileges and honors, and the foundation of a democratic state is laid, but the preservation of its liberty is to be secured only at the price of "eternal vigilance" against the entrance of despotic power. In its political aspect, the equality of democracy means equality of citizenship, equality of legal rights and obligations, equality before the law. On its social side, it means equality of opportunity. Neither in the one nor in the other does it mean equality of natural endowment or of possessions. This truth is recognized by the more thoughtful men, even among the most advanced radicals. But not all will hear the voice of reason. As held in the minds of many, the new theory of social justice is emotional, not ratiocinative. It demands equality. But it does not mean that all shall enjoy the protection of equal laws, but that all shall be made equal. Equal laws do not level the inequalities of individual ability or individual enterprise. Since these are not the product of law, equality before the law will

not obviate inequalities of possession and prosperity. But this does not satisfy the philosophers of the new school. To them it is not enough that all men should equally share the benefit and protection of the law, or enjoy equally the opportunities of life. They demand, in effect, not equal laws, but laws of equalization.

They forget that if equality is the gift of democracy, its one essential virtue—losing which it will sooner or later surely lose its very life—is justice, impartial justice, justice to all; because it is the prerequisite to liberty and the one vital condition without which equality and fraternity are but empty and mocking words. Justice is a very precious thing, a very high ideal. But it must come down out of the clouds and be made vocal in the law of the land. The experience of mankind shows that it comes nearer to full realization when the impulse to be just, generally prevalent, though oftener based on feeling than on reason, is fortified by constitutional guaranties for its enforcement than when left to the unregulated will of those whose vision is clouded by merely transitory events or distorted by a personal sense of wrong. For this is surely true, that while the will of the people may shift and change, may be swept by gusts of passion, may follow the ignis fatuus of error, yet throughout the entire web of civilization there run certain principles of justice and of right, eternal and unchanging, which cannot be violated save at the risk of incalculable harm.

But after all, it is not by the aid of constitutions alone that democracy may attain its goal. The wise restraints

and limitations of our constitutions are not fetters to bind the striving feet of democracy, nor manacles to chain its upward-reaching hands. But neither can they furnish the power which may enable it joyfully to run the race that is set before it. Constitutions and laws are written upon paper, but the true principles of democracy must be graven in the hearts of men. And these are not all summed up in the maxims of liberty, equality, and justice. There is this further, that the beneficence of democracy must be impartial and the end of its endeavor must be the welfare of all. There can be no true advance in popular government until men realize that democracy does not mean the control of government in the interest of either mass or class, but that it means a government of the people (all of them), by the people (the whole people), and for the people—not for the benefit of any less than the entire body of citizenry. Too often we forget this. Too often we look at the problems of our national life as merely separate and disconnected fragments. Neither will the true face of democracy be revealed to us, nor inspiration given for her efficient service, until we can tread the mountain tops of understanding and thence survey the whole vast field of human endeavor. Then and then only, will it be given to us to perceive that government by the people must not be likened to a crass struggle for existence, in which every man's hand is raised against his neighbor, but that it must be based upon co-operation in mutual aid and service, each striving for the good of all, and all for each. Democracy must learn the lesson of humility. It must put away

all dreams of personal or class aggrandizement. It must proceed, in Lincoln's words "with malice toward none, with charity to all."

The struggle for democracy has been going on for many an age and throughout the world. Conceived in liberty, America has always stood forward as its champion and defender, and our influence and example have affected the destinies of peoples separated from us by half the circumference of the globe. We have come to see that something more than boundary lines, something more than forms of government, is at issue in the stupendous war. Now at last, and once and forever, the world is to be made safe for democracy. And when that is done, our country will have the opportunity to enter upon a mission of immense helpfulness. In the reconstruction of the world which must follow the close of the war, America has a part to play, not only as an advocate of enduring peace, but as the protagonist of free and righteous government, government by and for the people. First, we must thoroughly set our house in order, and then we may issue forth as the standard-bearer of true democracy, holding up its high ideals to the gaze of all nations—to those which, with vision clarified by the fires of suffering, now see eye to eye with us—to those which, close to our own shores or far remote, are striving to follow in our footsteps—to those as yet distraught and drunken with the acrid smoke of battle. For the cardinal principle of American democracy is justice; its hope, the brotherhood of mankind; and its symbol, "Liberty enlightening the world."

Constitutional Changes in the November Elections

The convention which has been occupied since last June in revising the constitution of Massachusetts wisely decided not to wait until its labors should be entirely completed, before submitting their results to the approval of the people at the polls, but instead directed the placing upon the ballots for the November election of the three specific constitutional amendments which the convention had so far approved and voted to recommend to the electorate. There were all adopted. The first, which has been commonly called the "anti-aid" or "anti-sectarian" amendment, was fully described in the October, 1917, number of the REVIEW (see page 162). As finally submitted it prohibits the grant of public funds in aid of "any school or institution of learning wherein any denominational doctrine is inculcated" or to any public institution which "is not publicly owned and under the exclusive control, order, and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both." This amendment, after very long discussion, not as to its essential principle, but as to its scope and form, passed the constitutional convention by a vote of 275 to 25. As the convention is very fairly representative of the entire state, as to race and creed as well as politics, it was thought that this decisive vote might be taken as an index of the popular decision on the question. Yet, shortly before the election, very vigorous opposition to the amendment was manifested, chiefly by members of the Roman Catholic

Church under the leadership of Cardinal O'Connell, and for a time its fate seemed uncertain. The majority in its favor (75,781 out of a total vote of 336,943) was the smallest received by any of the three amendments.

The second amendment is in the following words: "The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency, or distress, of a sufficient supply of food and other common necessities of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and provide the same for their inhabitants in such manner as the general court shall determine." The necessity of such an amendment to the constitution was not altogether apparent, in view of the fact that the legislature had already placed in the hands of the governor very large powers for the sequestration, control, and distribution not only of the necessities of life, but also of the instruments of production and transportation, and the validity of its enactments does not seem to have been called in question. However, the amendment extends similar powers to the cities and towns of the state, and it makes clear the principle that their exercise is justifiable only in time of war or under the pressure of some other great public exigency. This amendment met with great favor at the polls. The ballots cast in the affirmative numbered 261,133, those against it 52,437, the majority in its favor being therefore 208,696.

The third of the amendments adopted on November 6th related to absentee voting. Though intended primarily for the benefit of those sons of the state who are in the military service, it is much more general in its application. It reads: "The general court shall have power to provide by law for voting by qualified voters of the commonwealth who, at the time of an election, are absent from the city or town of which they are inhabitants, in the choice of any officer to be elected or upon any question submitted at such election." Provisions for receiving the votes of soldiers absent from their own states were incorporated into many of the state constitutions, both in the north and south, during the period of the Civil War, but they have not generally survived, as some of them were limited to the duration of the war and others were repealed after its close. But few states found themselves constitutionally able to provide for absentee voting when the National Guard was taken into the federal service and sent to the Mexican border, because generally the constitutional provisions were so worded that the voting privilege accompanied the soldiers only "in time of war." The electoral clause of the constitution of New York, for instance, contains this sentence: "In time of war, no elector in the actual military service of the state or of the United States, in the army or navy thereof, shall be deprived of his or her vote by reason of his or her absence from such election district." But the broader provision—for absentee voting generally—is in force in several of the western states, and it is thought that

no particular dissatisfaction has been expressed either with its principle or its operation. It is one of those surprising manifestations which so often emerge from a general election that 76,765 persons should have voted against this amendment to the constitution of Massachusetts. Yet as it was favored by 281,817 voters, it will be seen that it was adopted by something more than a comfortable majority. The amendment is not self-executing; it only gives power to the legislature to enact a statute upon the subject. But within eight days after the election a bill was introduced in the Massachusetts legislature under which any voter of the state, if required by his duty as a member of the military or naval forces of the United States, or by his business or occupation, to be absent on election day from the city or town in which he is registered may obtain by mail a copy of the official ballot and return it, after execution, to the registrar in the same way.

An analysis of the vote cast in Massachusetts shows a very unusual and very commendable public interest in the three proposed amendments. It is notorious that constitutional amendments proposed in any state are very often regarded with languid indifference, that only a small proportion of the voters who actually go to the polls will take the trouble to express a preference as to such matters, and that important amendments have sometimes been adopted by majorities so small as to constitute but a negligible fraction of the electorate. But in Massachusetts last November, while the total vote was not heavy for the state (as it

was not a presidential year) the votes cast on the "anti-aid" amendment amounted to 86.73 per cent of the votes cast for governor, those cast on the absentee voting amendment amounted to 79.43 per cent, and those on the amendment relating to state and municipal control of food supplies and other necessities amounted to 80.71 per cent. It is significant that the corresponding percentage of votes cast at the 1916 election on the question of calling the constitutional convention was but 64.3. This seems to show that the people of Massachusetts were not greatly dissatisfied with their existing constitution and not profoundly interested in its proposed revision, but that specific amendments placed before them by the convention were taken up as matters of very general public concern. But the people have been very much interested in the convention, which has been in session since last June. Its debates, hearings, and resolutions have been copiously reported in the press, and some of the measures pending before it have been the subject of wide and warm discussion outside the convention, and even of mass meetings and other demonstrations. It would have been strange, indeed, if this spirit of curiosity, interest, and partisanship had not been reflected at the polls. The general result appears to be an emphatic approval of the convention and its work, which should give encouragement for its further progress with the work of reviewing the constitution. The Springfield "Republican" probably expresses the views of most of the people of the state in saying: "The constitutional convention should

take heart. What more does it want as a popular indorsement than the overwhelming ratification by the people of the first three amendments submitted to them? The convention's existence is so thoroughly vindicated that those who maintained that there was no popular interest in it might well scurry into the background."

In New York, the only amendment submitted at the November election which was of interest from the standpoint of constitutional government in general was that giving the right of suffrage to women. The result bore witness to a most remarkable change of sentiment in the state. When this question was put to the vote a very few years ago, the proposal to enfranchise women was defeated by a majority of about 190,000. But in the meantime approximately one voter in every four must have changed his mind. For the equal suffrage amendment was carried in 1917 by a majority close to 100,000, which was, roughly speaking, 10 per cent of the total vote cast on that issue. It is estimated that there are nearly 2,000,000 citizens of the state of New York who will thus become vested for the first time with the elective franchise. It has been granted to them in the widest possible form. Their right to vote is not restricted to presidential or other federal elections, nor, on the other hand, to local or municipal elections. The amended constitution gives the ballot to "every citizen of the age of twenty-one years who shall have been a citizen for ninety days, and an inhabitant of this state one year next preceding an election," with certain minor restrictions as to the time of

residence in the county and the election district. Moreover, as the qualifications required of all the officers of the state, from the governor downward, are defined in the terms of the section on the qualifications of electors, it follows that any woman voter of New York will be eligible to hold any office to which she may be elected. By virtue of another provision of the constitution of that state, a constitutional amendment ratified by the people becomes effective on the first day of the year following the election at which the ratification was given. The women of New York may have the privilege of voting at the local option elections next April, but the general election in November, 1918, will afford them the first opportunity to exercise the full right of the franchise.

The same issue was presented to the voters in Ohio, at the recent election, but in a different form. The legislature had passed an act conferring upon the women of the state a limited right of suffrage, including the right to vote for presidential electors, following in this respect the example of Illinois. This was within the power of the law-making body and required no change in the constitution. But Ohio enjoys the privilege of the initiative and referendum, and the supreme court of the state decided that the suffrage act was subject to the suspensory provisions of the referendum clause in the constitution. A sufficient number of signatures to a referendum petition was secured, and this made necessary the submission to the voters at the November election the question whether they wished to repeal the law or allow it to stand.

Their declaration at the polls was unfavorable to its continuance. The act of the legislature was repealed, or rather annulled, by a decisive majority.

At the same election in Ohio a proposed amendment to prohibit the manufacture and sale of intoxicating liquors was defeated by the very narrow majority of 1,137 votes out of a total of 1,046,317. A similar amendment had been proposed to the voters of Iowa at an election held in the preceding month, and was rejected by a majority of 932 out of a total vote approximately half of that cast in Ohio. On the other hand, the prohibition amendment proposed in New Mexico at the November election was carried by a majority which is described as "overwhelming."

In Kentucky, by a vote of 49,958 against 30,180, a constitutional amendment was adopted which modifies the anti-trust or anti-monopoly provision of the constitution so as to permit the merger or consolidation of telephone systems. Competition between various independent lines, all serving the same territory, had resulted not only in conditions which were disastrous to the companies themselves, but in unnecessary duplication of investments, deterioration in the quality of the service, and hardship to business interests through the necessity of maintaining two or more telephones where one would amply serve the purpose. It appeared that there was a universal sentiment in favor of abolishing this wasteful system. The amendment authorizing the adjustment of the situation was submitted by the legislature with practical unanimity and was indorsed by

civic bodies and newspapers all over the state. It seemed not only safe but expedient to relax in this particular the severity of the provisions against monopoly, more especially as the doctrine that the charges of public-service

corporations may be regulated by law has come to be judicially recognized in Kentucky as elsewhere. It is therefore incomprehensible that 30,000 voters out of 80,000 should have registered their disapproval of the amendment.

The Case Against the Initiative and Referendum

The theory and practice of direct legislation by means of the initiative and referendum were made the subject of exhaustive discussion and argument at the hearings held before the committee of the constitutional convention in Massachusetts to which had been referred a proposal to incorporate these so-called agencies of popular government into the fundamental law of that state. The proposed amendment was recommended to the convention by the committee, by a vote of eight members against seven. After long consideration by the convention, and after undergoing considerable modification there, it was adopted by the convention and will be submitted to the voters at the election in November, 1918. But the seven members of the committee who disapproved the plan united in the preparation of a very vigorous minority report, from which we extract the following paragraphs for the benefit of our readers:

"We regard the adoption of the initiative and referendum in any save the most carefully restricted form as in essence a complete subversion of our form of government and an abandonment of what the framers of the constitution of Massachusetts and that of the United States held to be the abso-

lute necessities and fundamentals of American democracy. Amendment of the constitution by the initiative would certainly be wholly destructive. It has been well said by David Jayne Hill, that 'the American solution of the problem of reconciling government with liberty consisted in the acceptance of four fundamental ideas, which constitute the cornerstones of the structure which we now call our national constitution, namely: 1. Representative government; 2. Division of public powers; 3. Guaranty of personal immunities; and 4. Judicial protection of constitutional guaranties.' This is equally true of the constitution of Massachusetts. To admit amendment of the constitution by means of the initiative as proposed by the majority plan would, in the view of us all, endanger all these four cornerstones and in principle overthrow them. The plan offers only the slightest restriction to the operation of the initiative on the constitution; and it requires no gift of prophecy to foresee that one of the first uses of it will be to loosen and broaden the operation of the initiative itself."

"As applied to statutory legislation, the majority plan, even if there were no amendment of the constitution by initiative, is subject to many of the

same objections. It would add to representative government a new unrepresentative form, neither so adequate nor so effective for wise legislation or the welfare of all the interests of our citizens or the security of all rights. It would inevitably be applied to matters for which it is wholly unfitted, and it would tend to break down the value of the representative form. Only a plan so restricted in method and application that its sole use would be the expression of a real public opinion and a real public will, on subjects where no individual rights and liberties would be invaded, on subjects where the people can have a real opinion and will, where their opinion would be a genuine supplement and assistance to the work of the General Court, without diminishing the value and the essential nature of that work, could be justified. A majority of the voters—in a choice of officials, even a plurality—must be allowed to govern. Their right to do so does not rest on power to compel the minority to obey. It rests upon a mere practical necessity. When the voters have discharged their obligation to the whole people, to consider fairly, impartially, and intelligently the matters to be decided by their votes, their decision must be accepted as right and submitted to by the minority; otherwise order and government cease. But if in any case the majority of voters act hastily, without deliberation; thoughtlessly, without a deep sense of responsibility; selfishly, without consideration of the rights or interests of individuals or of the minority; or ignorantly, without knowledge of the true grounds or of the consequences of

their acts—then, in that case, the justification of majority rule is swept away and democracy becomes in that particular case a failure, and possibly a means of tyranny, the tyranny of the majority.”

“The measure now presented by a majority of this committee provides for a fundamental and revolutionary change in altering this solemn compact between all the people and every individual citizen, in that by it a majority of the voters who may at any time vote upon a particular amendment are permitted, in spite of the protest and the adverse action of the representatives assembled in General Court of all the people in the commonwealth, to compel a change in the solemn compact or constitution which determines the right and liberties of all. This fundamental change should be clearly understood. Under the resolution reported, an amendment to the constitution initiated by petition, though twice rejected, disapproved, and condemned by the representatives of all the people, may nevertheless be forced upon the people by a majority vote of those who cast their ballots at the next election, though that majority may be only a minority of the whole number of voters. An organized minority may change the compact by which all have agreed to be bound, may impose new and different obligations upon all, may take away from them rights which are cherished and have been preserved to them by solemn covenant. Tyranny of the majority may be unlikely, but the only protection of the others is to make it impossible.”

“The present constitution guarantees to every citizen the right to wor-

ship God agreeably to the dictates of his own conscience. That right cannot be taken away from him under the present constitution except by the action of the representatives of all the people assembled in General Court in two successive years, followed by a confirming and ratifying vote of the people themselves. The advocates of this measure propose that, in spite of the refusal of the representatives of all the people, assembled in General Court, to deprive the individual of that right, a majority of the voters, not a majority of all the people, at any given election may so alter the constitution as to take away this right of freedom of worship. Because the voters now might do this, with the previous advice and approval of the sworn representatives of all the people in two successive General Courts, it is argued that a majority of the voters ought to have the same power without that advice and approval, but at the instigation of irresponsible petitioners. Again, the advocates of amendment to the constitution by the initiative openly avow and proclaim that it is within the purview of the measure they advocate to permit by a majority vote amendments of the constitution which will effect recall of judicial decisions and recall of judges, which may alter in a moment all that body of fundamental law which 137 years has built up to secure the individual in his personal and property rights, which may subject one class of the community and one geographical section of the commonwealth to the domination of another."

"Against these possibilities, nay, probabilities, the advocates of this

measure offer only the suggestion that we may rely upon the good sense of the majority. Some of the advocates of the initiative urge its adoption with the soothing assurance that it will be seldom used and its effect will be quite innocuous and little to be feared. But others solemnly assure us, upon a knowledge which they advise is based upon an intimate familiarity with the facts, that labor organizations, and the socially discontented and unfortunate, must have the initiative or they will eventually destroy the government. If the first assertion is true the measure is unnecessary; if the second is the fact, those who would destroy the government without the constitutional initiative would surely do so when its vast possibilities for destruction are placed firmly in their grasp. If a constitution means anything as a fundamental and organic law, if it is to protect the rights of individuals and minorities, if it is to be the assurance of wise, deliberate, intelligent legislation, it must have stability and permanence. It is dangerous to give power on the assumption that it will not be used, and if the radical and complete use of the power given by this measure is unwise and undesirable, it is the duty of the framers of a constitution to guard against the danger and not to recommend to the people the assumption of that power."

"Our objections to the majority plan in its application to the enactment of ordinary laws rest upon a different basis from our objections to it in its treatment of the constitution. In the latter case it is a question of principle, of duty; in the former, if there be no

amendment of the constitution by the initiative, it is a question rather of wisdom and expediency. Yet here also it must be kept clearly in mind that a successful democratic government requires real, deliberate, just, and intelligent public judgments. Nothing else is entitled to the name of 'public opinion' or of 'the will of the people;' nothing else can be justifiably enforced upon minorities or individuals. The question is: Will laws enacted by the mode proposed in the majority plan express the real opinion and will of the people better than laws enacted by chosen legislative representatives, under their conditions of duty and responsibility, of time and opportunity for investigation, consideration, debate, and amendment? We are not inclined to deny that there are instances of misconduct on the part of individuals in our legislature today, or to assert that the actions of all legislators can be freed from every unworthy influence. But we do assert, and in this we are supported by the testimony of many of the ablest and most trustworthy observers, of all shades of political opinion, that corruption and bribery of legislators in Massachusetts today is practically non-existent; that the large majority of our legislators are honest and faithful; that in character and intelligence they more than fairly represent the average of their constituents; that the illegitimate and selfish influence of capital and special interests is rapidly and steadily growing less, and rarely today has any decisive force upon our legislation. It is doubtful whether it has anything like the force of the influence of organized labor."

"The majority plan opens up the whole field of legislation to the initiative action of groups and factions, of visionaries and of selfish interests, without the slightest requirement of real interest on the part of the public or real conviction that the legislature is misrepresentative; and any suggestion of a plan to make the operation of the initiative square with their own reasoning and their own grounds of complaint they classify as a 'joker' designed to make the initiative unworkable. And by 'unworkable' they seem to refer to any restrictions that will prevent the initiative from having the practical operation desired by their allies, whose ideals and objects differ so greatly from theirs. We are more inclined to accept the expressions of these less discreet allies as truly representing the result of the majority plan than those milder advices which suggest that it will seldom be used. Majority votes, under the plan proposed, will not be a real expression of public opinion. The text of a proposed law will be seen by few petitioners and read by an insufficient number of voters. There will be unfair advantage of certain petitioners, thoughtless signing of petitions, no limit of number of questions on the ballot, legislation by minorities, legislation by special interests. There is no assurance that the measures initiated will be within the scope of the interest or information of the average voter. They may be as abstruse, as complicated, as uninteresting, as full of tricks and jokers, as alluring a combination of what is popular with what is desired by selfish interests, as the proposers of the measures may choose.

There is nothing to prevent the presence of conflicting bills on the same ballot, and no sufficient means of warning the voters that they do conflict. How can anyone expect a real public opinion to be formed, not by the growing need and natural interest of the people, but at the sudden compulsion of some group?"

"No sufficient evidence has appeared of any real popular demand for this measure. The votes which have been taken on the question in recent years in this state are neither impressive nor conclusive. The vote for the election of members of this convention is inconclusive. The hearings before this committee presented no evidence of such a demand. The largest attendance at any hearing (and that the first) did not exceed 25 persons, and the attendance dwindled until not more than a handful of persons, long-time advocates of the measure, were present. On no occasion was there any demonstration of public interest; the public did not by letters or otherwise communicate to the committee its desires or demands; the general newspaper press did not present to a great reading constituency detailed and reasoned views in favor of the measure, nor give any evidence of widespread interest on the part of their readers. That the amount of popular demand can be clearly estimated from these facts we do not for a moment contend. But it is plain to us that no advocate of this measure is warranted in urging it upon the convention on the ground that there is a clear popular understanding of its meaning and demand for its adoption."

We quote also the following passages from a very able address delivered to the convention in the course of the closing debate on the subject: "The initiative and referendum is either a passing political craze which will have its day and disappear, like know-nothingism and populism, the greenback and free silver, or it is the beginning of the end of representative government. If it is the former, its adoption here will do nothing but discredit Massachusetts as betrayed into a departure from her accustomed good sense and political sagacity. If it is the latter, it is the first step toward superseding our present system of representative government by unrestrained democracy. It is not a new piece of machinery for representative government, but a new method of government, and two systems so repugnant to each other cannot permanently stand together. The scheme is yet in the experimental stage. It has never been tried under conditions bearing any resemblance to ours in Massachusetts. Unrestrained democracy has destroyed every state in the history of the world that tried to stand upon it, and no form of democracy ever gave promise of permanent survival until the people found out that they cannot trust themselves without the checks of the representative system. If there are those who believe that the republican experiment is finally established, they are mistaken. Every student of history knows, and every man of common intelligence can see, that the difficulty of maintaining free institutions increases with congestion of population and the increasing complexity of social and

economic conditions. Our government has never been secure, and it was never more insecure than it is today. We are approaching, if we have not reached, our time of trial. The ultimate effect, if not the object of the initiative and referendum, say what you will, is to enable a majority at the polls to appropriate the property of those who have it to the use of those who want it. With this weapon in their hands they can do that or can do anything. It commands all the rest. To put the unrestrained control of property rights into the hands of the majority, taken as they come, is too much for human nature. If the average man is told that he can have what he wants by voting it, he will vote it, be the consequences what they may. We are in the throes of a world-wide socialistic agitation which aims to unsettle and ultimately to break down the security of property, on the way to the universal equality which can be reached only by pulling down the prudent and industrious to the level of the thriftless and improvident. We are in the con-

vulsions of a world war, under which all political conditions are in ferment and upheaval. Even as we speak, events of sinister significance are occurring day by day, both in Europe and in our own country. We cannot forecast the conditions that may confront us before the war is over or when it is over. We are now unavoidably entangled in the new peril of militarism, which this is neither the time nor the place to discuss. I make no predictions and do not mean to magnify any apprehensions, but let no member of this convention deceive himself with the idea that we can adopt this scheme, if it is anything but a passing absurdity, and keep the substance of representative government or the safeguards on which we have grown to depend. We must all agree that it is not the part of wisdom to try unnecessary experiments, even under the most favorable conditions, upon our political institutions. The present is not the time, nor Massachusetts the place, for such an experiment as this."

Commission Government for States

Among the men who have written and spoken much on the problems of government in late years, some have looked on the city as a diminutive state, while others have seen in the state a magnified city. The latter, claiming and no doubt believing that the commission form of government as applied to cities has been an unqualified success (though it may not be altogether necessary to concede this, seeing that

not a few cities which have given the plan a thorough trial have abandoned it and returned with thankfulness to the old-fashioned methods), have asked why it should not be equally effective and beneficial if applied to states. Numerous plans have been proposed, all involving a more or less complete replacement of existing forms of government in the states. Some would retain both houses of the legislature,

but would reduce the senate to a very small body, having more to do with the administration of the state's affairs than with the making of the laws. Others would retain only the lower house, to serve as a popular legislative assembly. Still others, averring that municipal councils have been advantageously cast into the discard, are inclined to think that all state legislatures might as well be treated in the same way. All of them agree, however, that the actual administration of government in all its details should be placed in the hands of a small committee or cabinet, consisting of the heads of various departments.

And this is not all abstract theorizing or mere advice. Proposals have taken concrete form, and have received very serious attention. In 1913 the voters of Oregon were called upon to decide upon the adoption or rejection of an amendment to their constitution, placed upon the ballot by means of an initiative petition, one of the important features of which was the abolition of the state senate. It was rejected, but nearly a third of the total vote was cast in its favor. In the following year, the governor of Minnesota urged consideration of a plan to abolish the state legislature and substitute for it a small body of elected commissioners. In 1915, the governor of Kansas very strongly recommended the reconstruction of the state government by reducing the legislature to a single chamber which should consist of sixteen members only. Similar plans have also been advocated in the conferences of the state governors. It might have been expected that propositions involving so

violent a change in our ancient institutions would be received with ridicule in some quarters, with strong opposition in others. But on the contrary, these plans have generally been hailed with enthusiasm. Conservative sentiment has been mute or nearly so. The reason is that it is nowadays the fashion to worship whatever smacks of "efficiency." The danger of substituting a bureaucratic administration for a popular government must not stand in the way of business.

The most extreme example of these plans for the renovation of state governments (in the sacred name of efficiency) is that put forward by an anonymous writer in the periodical called "Equity" for July, 1917, who has addressed an open letter to the members of the Massachusetts constitutional convention, proposing a plan of government for that ancient commonwealth, which must have stupefied some of the delegates (if they read the article) and incited others to unseemly mirth. The matter would not be worthy of serious consideration, save that it shows how far away some of our people have drifted from the old ideals of personal freedom under representative government. "It is proposed," says this advocate of efficiency, "that you will so word the first chapter of the new constitution of Massachusetts as to place the whole responsibility and power of the state government, legislative, administrative, and judicial, in the hands of a single body of officials to be known as Commissioners of State, who shall be elected on the principle of proportional representation for terms of four years, but that the peo-

ple shall reserve to themselves full power of control by means of the initiative, referendum, and recall. The number of commissioners shall be sufficiently small not to be unwieldy." Seventeen is suggested as a suitable number. "It is proposed further that this elected governing body shall be authorized to select an official to be known as the State Administrator, a person known to possess expert abilities and to have special training and experience for this post. This official might or might not be a resident of the state at the time of his selection. The State Administrator should have an indeterminate tenure of office, subject at all times to removal by the commissioners by majority vote. For his actions the State Administrator would be responsible directly to the Commissioners of State." "It is proposed further that the said State Administrator shall be empowered to appoint the heads of such departments as the commission may create. We here suggest, though not dogmatically, the following five: Minister of Justice, Minister of Finance, Minister of Industry, Minister of Interior, and Minister of Education. Under these five ministries all of the necessary work of the state administration would be organized and conducted." The system in operation is described with enthusiasm. The Minister of Justice, for example, "would be a lawyer with high administrative abilities. He would co-ordinate all the courts throughout the state. He would have such appointing power as the State Commission would give him. He would perhaps appoint the Attorney General, and he would co-ordinate the

work of the county prosecuting attorneys throughout the state. Ways would be found to tie up with municipal administration of justice, helpfully to both state and city administration. The state supreme court would be an elastic institution. The businesslike Minister of Justice would so reform court procedure as to make justice direct and prompt, and he would not tolerate technical subversions of justice in any state court. * * * With such machinery of justice, but few appeals would be made to the supreme court, which need have no permanent existence, but be called into existence by the Minister of Justice only upon occasion."

Here we see the principle of centralization carried to its last, yet most inexorably logical, extreme. To use the idiom of the street, this is concentration with a vengeance. Having first made secure the ineffable blessings of the initiative, the referendum, and the recall, it seems that all that is needed for the democratic government of a commonwealth is an imported state administrator untiringly "on the job," an industrious coterie of officials exercising their combined legislative, administrative, and judicial prerogative, a businesslike Minister of Justice sternly vigilant against subversions, and an elastic and discontinuous supreme court. One can fancy that after about one year the chief occupation of the citizens would be circulating and signing recall petitions, or else emigrating to some other state where the courts were frequently in session. And, incidentally speaking, nearly all the administration of a city is business, and nearly all the administration of a state is not.

Important Articles in Current Magazines

"Ideals of Democracy in England."

Whether democracy is regarded as a particular kind of political organization or as a social atmosphere, or both, the institution may be said to exist where social action is based upon the fundamental common qualities of all men and women, though it does not involve the denial of differences in genius or character. "But democracy is nowhere achieved, since nearly all our inherited social structure is based upon the subordination of a common humanity to the differences within the group. Democracy therefore remains an unachieved ideal, and those who work for or hope for democracy aim in every country at emphasizing the importance of the human being, however foolish or incompetent." Thus prefacing a very interesting study of the "Ideals of Democracy in England," in the *International Journal of Ethics* for July, 1917, the author, Mr. C. Delisle Burns, of London, points out that any judgment of the aspirations or tendencies of democratic feeling in that country must not be based on what is said and written and done in London alone. "The vigor of social idealism is in the Midlands and in the north of England; and an analysis of English tendencies towards democracy must be based upon experience and understanding of Manchester and Bradford and Newcastle. For in the first place the social ideals of Brighton or of three-quarters of London are anti-democratic; or if they are called democratic, it is the democ-

racy hoped for by officials. And if London were England there is little doubt that we should soon have established an absolute bureaucracy, dominating a subservient and even an admiring populace, with the assistance of an inconsequent and ignorant literary clique." The basis of English democratic ideals is respect and admiration for persons who work, and whose work is not for their own selfish desires, but of a nature to be useful to others. It is upon those who thus work, and who share this sentiment, that the future of England will depend. For "whether gentlemen or not, those who are vacant of any purpose will have comparatively little effect upon succeeding generations, and the only vigorous feeling in England seems to be in the direction of democracy. The common man is not ashamed of his position, and he increasingly expects to be treated as though his humanity were more important than his income or his relatives." Democracy no longer implies a sullen hostility to wealth or rank. There is no particular prejudice against differences of income, if only a man will play his part and pay his share. But the strength of the movement lies between the two extremes, because the very rich do not feel their dependence upon their fellow-men, and the very poor have no time or energy to work for anything but a bare living. The ideal of English democracy is a state of society "in which there are none so rich as to be enforced idlers and none so poor as to be only workers." The

world will never be so blissful a place that the need of charity will end. But the democratic state will not leave welfare work to the impulses of charity, nor permit it as an act of condescension; it must be the serious and intelligent business of the entire community. "The forward-looking few in England have with them a dumb majority who can see well enough that the age of privileged leisure must give place to the age of equal labor for the common good. There is still too much to be opposed in the conventions of society, the nepotism and favoritism of the ruling classes and the general waste of intelligence, for the ideal aimed at to be the center of common interest, and therefore that ideal is not clearly conceived. But it is easy to obtain a response from any group of those who aim at democracy if the Utopias are described in which what are now the privileges of leisure,—music, painting, and the rest, are imagined to belong by right to those who work."

In the second place, Mr. Burns affirms that democracy in England involves a sense of the equal value of work well done. He has some difficulty in extricating his thesis from the socialistic trend towards the discouragement of ability and the establishment of universal mediocrity. But he is clear that "in its best meaning, the democratic feeling of the equal value of all good work does not imply the denial of a superior value to intelligence. The point is that so long as the work is honest and necessary it is equal with all other such work in being socially good, and that alone is the ground for the workman's confidence in him-

self." He also finds a modifying influence upon the ideals of democracy to flow from the inveterate English love of "sport." The democrats of France and other countries are disposed to regard the English democrat as lacking in earnestness or as being reckless. But real strength comes to the English from the possibility of self-criticism which is implied in turning solemnities to laughter, and relieving labor with sport.

On the political side, the ideals of democracy in England involve principally a modification of the present system of representation and freer access to the land and the means of production. The government of England must cease to be a matter for the occupation of a single class, the rich. The business of becoming and being a member of Parliament must no longer be so costly that the poor man cannot aspire to it. "The ideal of political democracy must clearly involve some reform by which political ability may be given its due place without the assistance either of private wealth or party funds." As to the other matter, "a few months before the war, the democratic movement in England was concentrating attention upon the land problem, and after the war the problem will be with us again. The political ideal at work is not the mere substitution of small owners for large owners, but the recognition by the state that land should not be a form of private property, any more than are water or air." As to the improvement of industrial and social conditions, Rousseau's theory of the office of the state in correcting natural inequalities in health, strength, parent-

age, or external circumstances, in order that the more important and valuable differences in character and intelligence may have free play, "lives on as a vaguely conceived ideal in the English efforts at industrial legislation, and we are clearly aiming at the democratic end of securing for every man and woman as much human life as is possible without subverting the whole of our inherited methods of government."

As to the position of the trade unions, the author has this to say: "English trade unionism as a political force has all the strength of self-confidence. Its members are not inclined any longer to be afraid of their own power, and although the majority may be uncertain in what direction that power should be used, the attitude of trade unionism is no longer apologetic or timorous. That shows the better side of the English aspirations towards democracy. But trade unionism, like English democracy in general, is deficient first in its incurable separatism, and secondly in its lack of appreciation for intelligence and intellectual qualities. The unions are not really at one in any great principle of social policy, and in their struggle with capital they do not often join hands. On the other hand, the unions have not adopted any policy nor even shown any interest in the larger issues of education. Their members generally are suspicious of any outstanding ability, and they have not yet learned to value the intelligence, which they might use, of those who do not work with their hands." For finally this distrust or hostility towards intelligence remains, as Mr. Burns says, as

the one corroding deficiency in every form of the English democratic ideal.

"The Menace of Maximalism."

"It is one of the contradictions of the situation (so writes Mr. Norman Angell under this title in *The New Republic* for October 27, 1917) that this war, towards which the extremer social reformers and socialists as a body are so cold, has accomplished over-night, as it were, a development of socialism which mere agitation would not have accomplished in half a century; and, a further contradiction, towards that development neither capitalism nor imperialism has shown itself particularly hostile. Yet the revolutionary movement among socialists is growing apace." The press of Great Britain has begun to regard this phenomenon with grave concern. It is pronounced a national danger. Policies of severe repression are advocated. In this country also, a serious appreciation of the situation, if not positive alarm, is becoming manifest, in view, for example, of the astonishing increase in the socialist vote polled in the municipal election in New York in November; and the demand gains strength that successfully restraining measures shall be put into effect against the radical agitators of all kinds. France and Italy have gone through similar experiences, says Mr. Angell, and evidently the problem involved is common to the western democracies. The root of the matter probably lies, he thinks, in the results to the working classes of the govern-

ment's close supervision (if not actual physical control) of the industries necessary to the prosecution of war, in England and some other European countries. Was not just such control the hope and dream of the socialists? Precisely, and their own philosophers were not weary of telling them that under such a system the workers would be turned into masters and come into their own. But hundreds of thousands are disillusioned. There has grown up "resentment against the bureaucratic state which has replaced the individual employer, or rather, in many cases, made a government official out of him and given him greater powers than ever. The worker still finds himself a 'wage slave.' But whereas before he had at least some choice of employers, some freedom of movement, could leave one job and go to another, could resent the tyranny of a foreman by downing tools, he finds, or has often found, that under the state he cannot leave, that this is an employer who can punish insubordination with death, by sending or returning a man to the army, and is one against whom it is treason to strike. And the 'state,' he finds, is really a new name for the old employer. The self-same 'master' for whom he worked originally has now become a government official, backed with all the forces of the government." So now the demand of the new socialism is not for state management of the industries, but for ownership by the state and management by the workers. For instance, the English socialists now demand the confiscation of the railroads by the state (without compensation) and that they

shall then be leased to the unions, who shall operate them.

Three facts or influences, according to Mr. Angell, have aroused the radicals to this new consciousness. First, they have seen the working of economic miracles. "With something like half the workers, and that half the best, drawn from production, the remainder can not only maintain the life of the country at a standard which is materially better on the whole than that which obtained before the war, but they can supply the vast quantity of material needed for the war itself. An obvious conclusion is that if the present workers, instead of being engaged upon the production of mountains of shells and war material, to be immediately destroyed, were engaged upon the production of things which made for the common welfare, and if to that source of increase were added the labor of those now under arms, the amount of wealth available for distribution, if properly distributed, would create a standard of living in the country so different in degree from the old as to be different in kind."

The connection between compulsory military service and the institution of private property is not so obvious. But Mr. Angell finds that the existence of the former has profoundly influenced the minds of the radicals in their attitude towards the latter. Conscription, coming suddenly in England and doing violence to the whole traditions of the English people, was a vivid and startling fact. Its lesson was that every able-bodied man owes a particular kind of service to the state, willy nilly,

and must, at the state's demand, be prepared to surrender even his ultimate possession, his life. Then, first, if he owes his life to the state, what does the state owe him in return? And second, if his tenure even of life itself is precarious as against the need of the state, has he a stronger title to his material possessions? Of course the British workingman's application of these questions was made only to his inveterate enemy, capitalism. But in that light the answer seemed to him clear. "For great masses of the British working classes conscription has solved the ethical problem involved in the confiscation of capital. The eighth commandment no longer stands in the way, as it stood so long in the case of a people still religiously minded and still feeling the weight of Puritan tradition. We have already had the demand from very powerful labor leaders for the confiscation outright, without compensation ('save for a generous provision against individual hardship') of railroads, mines, shipping, and public utilities generally."

A third influence playing upon the new consciousness of the radical leaders is their conviction that they will be justified in going to any lengths in the way of adventure and experiment. Has not the war witnessed many a military experiment, foredoomed to failure, or failing at the last in spite of heroic effort? And have not these experiments cost uncounted treasure, uncalculated suffering, and tens of thousands of lives? Then why be timid in the adventurous prosecution of plans for the revolutionizing of industry? Tell the advocate of the new doctrines that his

plans cannot succeed, that the work of the world cannot be so carried on, that credit will be upset, trade disturbed, and the whole house of his dreams come crashing to the ground, and he will simply answer: "What of it? What if the experiment does fail and we have to try something else? At any rate, it will not have cost ten million lives, like the war." We may be sure, says Mr. Angell, that the English maximalist is not to be impressed by such arguments; he is abundantly ready to take whatever risks may be involved, and "he will introduce a little of the strenuousness and adventure of war into the life of peace."

But the question is asked why the advanced democrats, the radicals and socialists, should be, in the mass, so lukewarm or even hostile to the great enterprise of the war. "Why should these of all people be less alive than others to the danger of world domination by a power which is the most anti-popular, anti-radical, and autocratic in the world, and the triumph of which would render the success of the radical millennium impossible? On the face of it, it would seem that it is precisely the revolutionary socialist who should be most concerned in the destruction of the most anti-revolutionary force of Christendom." Perhaps he is so concerned. But what comes nearer to his concern is his fear that the triumph of the allies in the war will not further his own private cause at all, but will result either in the establishment of a bureaucratic despotism in industry or in the domination of those "conservative" or "reactionary" elements of the people, whom he so ardently hates, and

who, so far as his vision goes, are precisely the most enthusiastic and determined partisans of the pro-war policy. "The radical not unnaturally asks what sort of peace is likely to result if that influence increases. And if he admits a risk to the democracy of the world in a too early cessation of the war, so also he sees a risk in its prolongation." Hence, finally, maximalists and other socialists formulate their demands and explain their attitude by saying that what they want is not a relaxing of the efforts to win the war, but an increase of the efforts to insure its "democratic" outcome.

"Individual Liberty and Public Control."

An able and convincing plea for individual freedom and the unhampered development of initiative in those things that pertain to the spirit, while admitting the need for an even increasing control by the state over those activities which find their outlet in material competition and in the gratification of acquisitive faculties, is presented under this title in *The Atlantic Monthly* for July, 1917, by the publicist Bertrand Russell, whose determined advocacy of fair play and fair trial for the "conscientious objectors" in England evoked wide comment, not all of it friendly or even temperate. After a discussion of the immemorial struggle of tribal and communal conservatism, backed by the immense force of tradition, on the one hand, and the sprouting impulses of the separate human being towards the challenging of accepted faiths and habits and to freedom of self-expression,

on the other hand, the writer registers his belief that "it is not likely that any society at any time will suffer from a plethora of heretical opinions. Least of all is this likely in a modern civilized society, where the conditions of life are in constant rapid change, and demand, for successful adaptation, an equally rapid change in intellectual outlook. There should therefore be an attempt to encourage rather than discourage the expression of new beliefs and the dissemination of knowledge tending to support them." He continues: "The greater part of human impulses may be divided into two classes, those which are possessive and those which are constructive or creative. Social institutions are the garments or embodiments of impulses, and may be classified roughly according to the impulses which they embody. Property is the direct expression of possessiveness; science and art are among the most direct expressions of creativeness. Possessiveness is either defensive or aggressive; it seeks either to retain something against a robber or to acquire something from a present holder. In either case, an attitude of hostility to others is of its essence." Defensive possessiveness, no less than that of the acquisitive sort, must be supported by force. But unrestrained liberty in the employment of force would invariably lead to injustice and would inaugurate anarchy. Hence freedom in this respect cannot continue in the individual. His primitive and unsocial liberty to kill, rob, and defraud has been curbed by law. It ought to be so, but it is not so, in the case of nations also. Under the name of "sovereignty" and the pre-

text of "patriotism," robber nations still walk abroad to murder and steal. To exert coercive force on his own initiative is no longer regarded as a rightful attribute of the individual, save in such rare emergencies as would be admitted in justification by the courts of law. Except in such emergencies also, as the enlightened judgment of the most of the world is coming to see, violence committed by one state upon another is no more susceptible of excuse. The reason is that the exertion of force works evil on both sides, no less to "the slayer than the slain," and if it can be admitted as warrantable in any case, it can only be for the sake of some ultimate good immeasurably outweighing the harm. "The whole realm of the possessive impulses," therefore, "and of the use of force to which they give rise, stands in need of control by a public neutral authority, in the interests of liberty no less than of justice. Within a nation, this public authority will naturally be the state; in relations between nations, if the present anarchy is to cease, it will have to be some international parliament. But the motive underlying the public control of men's possessive impulses should always be the increase of liberty, both by the prevention of private tyranny, and by the liberation of creative impulses. If public control is not to do more harm than good, it must be so exercised as to leave the utmost freedom of private initiative in all ways that do not involve the private use of force."

But turning to that which creates rather than acquires, which imagines but does not plot, which takes from none but gives to all, the interference

of the state should be for encouragement, and not for repression or control. "The creative impulses, unlike those that are possessive, are directed to ends in which one man's gain is not another man's loss. The man who makes a scientific discovery or writes a poem is enriching others at the same time as himself. Any increase in knowledge or good-will is a gain to all who are affected by it, not only to the actual possessor. Those who feel the joy of life are a happiness to others as well as to themselves. Force cannot create such things, though it can destroy them; no principle of distributive justice applies to them, since the gain of each is the gain of all. For these reasons the creative part of a man's activity ought to be as free as possible from all public control, in order that it may remain spontaneous and full of vigor. The only function of the state in regard to this part of the individual life should be to do everything possible towards providing outlets and opportunities." Thus, for a practical example, the true object of education, our author holds, is not to make all men think alike, but to make each man think in the way that is the fullest expression of his own personality. Undoubtedly the state has the right to insist that the children shall be educated, but not that they shall be educated on a uniform plan and to a uniform extent, to the consequent repression of individual gifts and the production of a uniform mediocrity. So, young people should be as free as possible to choose those occupations which are most attractive to them and most likely to develop their individual capacities. For finally, "the problem

which faces the modern world is the combination of individual initiative with the increase in the scope and size of organizations. Unless it is solved, individuals will grow less and less full of life and vigor, more and more passively submissive to conditions imposed upon them. A society composed of such individuals cannot be progressive, or add much to the world's stock of mental and spiritual possessions."

"Organizing Democracy."

That the safety of democracy depends upon the organization of democracy, and that the reform most needed in the way of securing wholesome and efficient action in the organs of democracy is to give to the executive authority (not covertly or by mere force of custom, but by law) a powerful, if not predominant, influence in the initiation and control of legislation, is the theme of Professor Arthur N. Holcombe's suggestive article in *The New Republic* for July 7, 1917, under the above caption. Distrust of the state legislatures, both as to their ability and their motives, has been rife. It has been sought to limit their capacity for harm, now by shortening their sessions, now by taking the government of the municipalities out of their control, and again by giving the people the right of initiative and referendum. "But too much cannot be expected from changes that merely limit the power of the people's representatives. Representative government is not to be regarded as an evil, to be tolerated only within the narrowest

possible limits. Those states which have proceeded most consistently upon that theory have not secured the best governments. Restricting legislators to activity only once in four years or only forty days at a time is a remedy that would cure the disease by the killing of the patient. The goal of the reformer must be, not to prevent the legislatures from legislating badly, but to permit them to legislate well." Many state governors have advocated the adoption of an executive budget, the establishment of a cabinet system of government in the states, or other forms of centralization of the administrative functions of government. These projects have most generally been rejected by the legislatures, not unnaturally reluctant to see their powers lessened or their prerogatives abridged. So the people have turned to constitutional conventions, but there also the proposed reforms have met with but little success thus far.

Whether we have adhered too rigorously to the doctrine of the separation of powers, or whether we have failed to apprehend the real nature of representative government, Professor Holcombe says that "the people of a state are not wholly dependent upon any one set of representatives. They are represented by localities through the members of the legislature. They are represented as a whole by the chief executive, and in most states by the supreme court. The entire legislative power is not conferred upon any one of these sets of representatives. It is divided between them." Then why rely wholly or mainly upon the legislative assembly for the performance of what

is necessary and beneficial in the process of law-making? Why not utilize the power of the people's other representatives? "The most promising plan for the better organization of representative government," says Professor Holcombe, "is to give a larger share in the process of legislation to that part of the government which best represents the people as a whole. This part is not the legislature. It is not the judiciary. It is the executive. The governor, as state government stands today, has the strongest claim to the right to voice the general will of the people of the whole state." We might well profit by example. The best organized government in the world today, he thinks, is that of the French Republic, and the reason is found in the practical monopoly of the initiative in legislation which has been acquired by the executive branch of the government. England, Germany, and Switzerland he adds as examples of a similar though somewhat inferior procedure. (Eleven countries of Latin-America have by their constitutions bestowed the initiative in legislation upon the chief executive, and seven others upon the cabinet ministers or secretaries, though in a few a reservation is made as to laws relating to taxes and laws for the raising of armies. In Belgium, Denmark, Holland, Spain, and Sweden, the king, as an integral part of the legislative body, has the right of initiative, exercised of course through his ministers. In Norway the constitution provides that every bill shall first be presented in the lower house of the legislature "either by one of its members or by the government

through a councilor of state." In Japan the practice is much like that in England, though perhaps individual legislators have more freedom. "Both houses shall vote upon projects of law submitted to them by the government, and may respectively initiate projects of law.") So that our author's assertion is not too surprising, that "a practical executive monopoly of the initiative in legislation is to be found in all the great and well-governed countries of the world, except our own."

To take away the right of initiative from the individual members of the legislature, and vest it exclusively in the governor, appears to be what Professor Holcombe would most approve. But he realizes that it is not practicable. A monopoly of any sort is abhorrent to the spirit of American institutions. No plan for setting up a new monopoly in legislation would be listened to. "But it is practicable to give the governor such a share in the initiation of legislation as will secure many of the advantages obtained in other countries by the practical monopoly which has been acquired by the executive. It is practicable to give him the right to introduce bills into the legislature and to appear in the halls of legislation and explain the purpose and propriety of his proposals, or to send others to speak for him. It is practicable to provide that he shall frame and introduce the bills for the appropriation of public money and to limit the right of ordinary members to introduce appropriation bills not sanctioned by the governor. Once the way has been prepared for more spirited executive leadership, capable executives can be trusted to

take advantage of their opportunity to make the general public interest predominate over the conflicting private and local interests in the legislatures." He turns hopefully to the constitutional convention in Massachusetts as a possible leader in the inauguration of a new era in state government. To the present time, that convention has not perfected a constitutional amendment dealing with this subject. But a plan which has been approved by the committee on the executive, and which is still pending, includes the following proposals: That the governor shall have authority to initiate and recommend bills to the legislature, which shall be known as 'executive bills,' and which cannot be stifled in committees,

because they must be acted on in thirty days; that the governor shall have power to refer to the voters for final decision any executive bill which the legislature refuses to pass, and also any bill passed by the legislature over the governor's veto; that the governor and the heads of the state departments shall have the right to appear before either branch of the legislature, and to speak, though not to vote; that the legislature may require the governor or the heads of state departments to appear before either branch to furnish information; that the governor may return any bill passed by the legislature with specific suggestions for its amendment; and that he may veto particular items in bills.

Book Reviews

THE REBUILDING OF EUROPE. A Study of Forces and Conditions. By David Jayne Hill. New York: The Century Company, 1917. Pp. 289. \$1.50 net.

We commend this volume to our readers as one of the most important contributions to the literature of world affairs which has been made in perhaps a generation, because of its comprehensive vision, its searching analysis of the causes that are at work for and against the world's peace, and its statesmanlike proposals for such political reconstructions as will be essentially necessary to make freedom everywhere secure and amity a normal and enduring condition in the intercourse of nations. Prepared for his task by long research in international history, by long and wide experience in high diplomatic office, and by exhaustive study of present-day conditions and tendencies, Dr. Hill has not been satisfied with casual observations on the future of democracy or superficial suggestions for the re-drawing of the map of Europe, but has gone to the very root of the matter, and has traced to its ultimate source the evil thing whose shadow beclouds the face of the whole earth. Its destruction is the final goal of the great war. "There is yet to be fought a battle more sublime than any ever yet waged in the name of democracy, because it will be a battle for that which gives to democracy its indestructible vitality—the essential dignity of the human person, and its inherent right to freedom, to

justice, and to the quality of mercy at the hands of one's fellow men. This is no tribal adventure, no thrust for territorial expansion, no quest for new markets and undeveloped resources, no aspiration for world supremacy; but a consolidated human demand that in the future the world be so regulated that innocent and non-combatant peoples may live under the protection of the law, may depend upon the sanctity of treaties, may be secure in their independence and rights of self-government, and that the people of all nations may enjoy in safety the use of the great seas and oceans which nature has provided as the highways of peaceful commerce and fruitful human intercourse." But if this aspiration of mankind is to be gratified, if this ideal of a new and better world is to be made real, it is time to examine and comprehend not only the causes which have hitherto thwarted it, but also the definite principles on which in the future it is to be based. "It is of the highest importance to the cause of civilization that the principles necessary to a true society of states should be clearly formulated and, as far as possible, accepted now, while the conflict is still going on, and those who profess to champion them should not hesitate solemnly to pledge themselves to respect and obey them."

Europe's heritage of evil was the persistence and eventual triumph of the tribal idea of sovereignty, as against the long struggle of humanism, which Rome sought to establish first by law

and then by faith, to gain the ascendancy. Emerging from the primitive forests of barbarian tribes, to spread over all the face of Europe, this conception of sovereignty has merely been that of supreme and absolute power, having law not for its support but for its creature, and making the "sovereign state" as irresponsible, as remote from any ethical obligations, as the tiger in the jungle. Hence the horrid right of a "sovereign state" to make war at its pleasure, with or without moral justification, to conquer its neighbors and enslave their people. "The right to make war at will and to be answerable to no one was, and is, the accepted doctrine of the old Europe, which merely asserted itself anew in 1914." But if not this, what does sovereignty mean? For this is the essential question. Is there, can there be, an attribute belonging to a nation which enables it to perform, as of right and without moral censure, acts for which an individual would be hung? Our author repudiates the idea of the state as a licentious monster. It is truly an entity; but it is a moral entity. It is just as truly subject to the restraint of the universal law of right and wrong in its dealings with other states as is a citizen in his intercourse with his fellow-citizens. And sovereignty "is not merely a name for supreme power. It is a right inherent in a free and independent group of human beings, possessing a definite territory, to form and maintain a government. Reduced to its simplest terms, it is the right of a free community to provide for self-regulation and to maintain its own existence.

Whatever is necessary to that, and nothing more, is included in this conception of the state. Only in an incidental manner does it belong to the category of might. In its essential attributes it belongs to the category of right." And if right and not might is to be the criterion of a state's acts, then the moral law will restrain it not only from collective murder, but also from robbery and plunder. But at present, militarism and commercial expansion are not enemies but partners. "Modern wars are primarily trade wars. Modern armies and navies are not maintained for the purpose of ruthlessly taking human life or of covering rulers with glory. They are, on the one hand, armed guardians of economic advantages already possessed, and on the other, agents of intended future depredation, gradually organized for purposes alleged to be innocent, and at what is esteemed to be the auspicious moment despatched upon their mission of aggression. International misunderstandings are readily adjusted when there is the will to adjust them; but against the deliberately formed policies of national business expansion—the reaching out for new territory, increased population, war indemnities, coaling stations, trade monopolies, control of markets, supplies of raw materials, and advantageous treaty privileges, to be procured under the shadow of the sword—there is no defense except the power to thwart or obstruct them by armed resistance." Beyond peradventure it was imperialism translated into terms of economics which brought on the present war. No intelligent person who has read history

can fail to see the nature of the opposing interests; but it should be equally obvious that to fight for them was a barbarous anachronism.

But how shall the world be reconstituted so as to make a recurrence of these scenes impossible? In the first place it is not a question of forms of government. No state really governed by constitutional principles can discriminate against another on such grounds, nor seek to impose its predilections upon another. It is first necessary to get back to the Kantian conception of law and to win for it the widest possible recognition. "If law is the formulation of justice and equity, resulting from a consensus of social needs interpreted in the light of reason, of which the state is an expression, then there is law for states as well as for individual men." In this connection, we commend especially Dr. Hill's brilliant and convincing defense of international law as truly "law," and of its sanctions, as based on its conformity with essential principles of justice and humanity, its free and general acceptance by states not deaf to the voice of morality, and the far-reaching consequences of disobedience to its mandates. But as for the future enforcement of the law of nations, it is not to be accomplished by the formation of an "*imperium supra imperia*." Plans hitherto proposed, "almost without exception have assumed that the basis of reorganization is exclusively political, and that there must be instituted what is equivalent to a superstate, a new sovereignty set above the national state as this is set over its constituent members." This is no true solution. "But

it is still possible for a union of states to be formed which can determine by what law its members will be governed, and it is possible for them to exclude from it any state that does not accept this law. The only way, it would appear, in which there is ever to be a real society of states is for those great powers which can find a sufficient community of interests to unite in the determination that they will themselves observe principles of justice and equity and that they will unite their forces in defense of them." "Would it not in fact appear," asks Dr. Hill, "that the most that could be reasonably expected in the form of an international organization fit to legislate and exercise judicial functions would, at least in the beginning, be a strong but limited group of powers, each willing to sacrifice something of its own sovereignty for the purpose of insuring peace and equity, thus constituting a coherent force, not upon the principle of the balance of power, but a nucleus for the ultimate union of all responsible and socially inclined nations?" But this need not be and should not be a federation. Dismissing as futile all schemes for a "United States of the World," or any similar international Utopia, Dr. Hill lays bare in a single sentence the one thought upon which an international organization of democracy can be built. "It might be in substance merely the formal recognition of a real, as distinguished from a purely fictitious, society of states, based upon common intentions and a declaration of definite principles of right which the members were willing to accept, to observe, and to defend." Auguries of

good hope for such a result are to be seen in the magnificent loyalty and co-operation of the British colonies and over-seas possessions in the prosecution of the war. Their status and their relations to the mother country are changing even as we speak. "It is in fact a confederation of autonomous self-governing republics, rather than an empire in the proper sense, that is coming into existence through this internal transformation of the British Empire. Common aims, common safety, common interests, and common ideas—these are the foundations of this confraternity." And on a wider scale, "in April, 1916, at the conference of the Entente Allies held at Paris, the sense of a commonwealth took a wider range, and this meeting, it has been held, assumed the form of a legislative parliament of France, Russia, England, Italy, Belgium, Serbia, Japan, and the self-governing British dominions."

The extent of the authority of an international parliament or conference is the crux of the whole matter of international organization. If compliance on the part of any state is to be entirely voluntary, the organization never advances beyond the preaching of a sermon. If compulsory, each state ceases to be independent, and sovereignty is lodged in a new central body. But reserving its political independence and territorial integrity, and supposing the conference to be composed exclusively of constitutional states, why should not any state agree to submit to any decisions in the nature of general laws which, after full discussion, the large majority is willing to accept and agrees to observe?

"There is no reason why such decisions in the nature of general laws, made under constitutional limitations, should not be freely accepted as binding. It is the only way in which the rules of international law can be brought to any high degree of perfection; and it is the perfection of these rules—that is, their approximation to principles of justice—that alone can furnish a basis for the normal life of a society of states."

How to make an end of economic imperialism? Let the nations renounce the lust for conquest and forego the robber-right to make war for gain, and the solution is easy. Let the business men of the world regulate the world's business. If not backed by armies, they can accomplish the necessary adjustments by the peaceful processes of negotiation and conciliation. "An international board of trade conciliation, composed of representative business men, supplemented by frequent general conferences, with no force behind them but the evidence of facts and the power of persuasion, if held to complete publicity, could accomplish more in five years to insure the peace and prosperity of the world than any secret negotiations by diplomatists backed by all the armies in existence. If the business of the world were once frankly established upon a world basis, community of interest would go far to discourage war, for modern wars originate chiefly from economic inequalities and ambitions; and the agents of economic power, if they were not in alliance with military force exercised in the interest of dynastic purposes, could more easily satisfy them by purely eco-

conomic means." In fact, "being an economic as well as a jural problem, international organization must be worked out by a combination of governmental and business agencies. Neither can be intrusted with the entire task."

In brief outline, such is the substance of Dr. Hill's profound and logical argument. His book should have a wide circulation. Its counsels are sane, wise, and practical. He has seen the dawning of a light which may rise and spread over the whole earth, when the weary work of war is at an end. America should be prepared for its coming. To this end, we need not only enlightenment as to the real principles which are at stake, but the formation of a wide, united, and powerful public opinion, so that, without divided counsels, the United States may unhesitatingly strive for the success of such ideals and such relations of the states of the world as will secure forever the reign of justice.

* * *

THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS. By Edward S. Corwin, Ph. D., Professor of Politics, Princeton University. Princeton University Press, 1917. Pp. 216. \$1.50 net.

This volume presents an exceedingly interesting, comprehensive, and well documented historical review of 124 years of contest between the executive and legislative branches of the United States government for the control of foreign relations. The few provisions of the Constitution which touch the

subject at all have not, as a rule, been judicially enforceable, because the specific questions presented have been political in character and the courts have declined to take jurisdiction. Hence each of the parties to the contest has been the interpreter of its own powers, and each has sought to check and limit the other. The result is that "that organ which possesses unity and is capable of acting with greatest expedition, secrecy, and fullest knowledge—in short, with greatest efficiency—has obtained the major participation. Nor can it be reasonably doubted that these results have proved beneficial. At the same time, they counsel the maintenance in full vigor of the political check on a power so little susceptible of legal control."

The struggle began with Washington's proclamation of neutrality in 1793, which was fiercely attacked as a usurpation of power belonging to Congress. It was defended by Hamilton, writing under the name "Pacificus," who took the extreme position that the constitutional grant of "executive power" to the president is a general grant, subject to no other restrictions or qualifications than those expressed in the instrument, and that the subsequent enumeration of certain of his specific powers and duties is not to be understood as confining the "executive power" to the instances enumerated. No one else went so far as this until President Roosevelt, who says in his autobiography: "I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do

it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws." As to Washington's proclamation, it caused much alarm to Jefferson, although he had declared that "the transaction of business with foreign nations is executive altogether." He called upon Madison (in the name of the Creator) to answer Hamilton's "striking heresies, and cut him to pieces in the face of the public." But Madison's reply, in a series of letters under the name "Helvidius," was tedious, pedantic, and inconclusive, and so far the victory rested with the executive.

And this has almost invariably been the case when the contest, instead of being a matter of newspaper discussion only, has been carried onto the floor of Congress. Disputes innumerable, and often acrimonious, have arisen as to the limits of the executive power and the concurrent or exclusive power of the legislative branch, in regard to the recognition of foreign governments, the negotiation of treaties, the sending and receiving of ambassadors, and almost every other kind of international dealings. We cannot follow Professor Corwin through the whole of his able and illuminating review of these discussions, though anyone who reads the volume before us with thoughtful attention will be amply repaid for his effort. But we cannot forbear mentioning one or two matters of special interest and importance. One is the constant effort of the presidents to rid themselves of the "advice and consent" of the Senate in the appointment of

diplomatic agents. Again it was Washington who began this practice. In 1795, the Senate being in recess, he appointed David Humphreys as commissioner plenipotentiary for negotiating a treaty of peace with Algiers. This precedent has been multiplied many times, as, for instance, in the case of the mission of A. Dudley Mann to Hanover in 1846, of the same gentleman to Hungary in 1849, of Nicholas Trist to Mexico in 1848, of Commodore Perry to Japan in 1852, and of J. H. Blount to Hawaii in 1893. The author states that as this volume was going to press the Root mission was leaving for Petrograd, and that he is "informed that Mr. Root bore the rank of ambassador and some of his associates the rank of envoy extraordinary, and that their names were not referred to the Senate, neither was the mission authorized by an act of Congress." Much the same may be said of the mission recently abroad under the leadership of Mr. E. M. House, who is reported to have announced himself as "a political representative of the American government." No doubt such incidents are amply supported by precedents. But as Professor Corwin says, "it is difficult to harmonize the practice, considering the dimensions it has today attained, with a reasonable construction of the Constitution." Congress itself has more than once attempted to put a check upon the executive in this matter, as by acts passed in 1855, 1893, and 1909, which either enumerated the countries to which diplomatic representatives might be sent, defined their rank as "ambassadors," etc., or provided that no new ambassa-

dorships should be created without the consent of Congress, in either case cutting off the power of the executive to fix the status of his envoys or to send secret agents or anomalous missions. But the attempt has always been ineffectual. The courts have not been in position to give an authoritative construction of the Constitution in such matters; but the Attorneys General have advised that all such provisions must be deemed directory only, or in the nature of recommendations, and not mandatory.

Another point of special interest regards the exercise of the treaty-making power. Presidents have consulted the Senate not only as to the expediency of negotiating a particular treaty, but also as to its very terms. On the other hand, Congress has sometimes advised, and almost demanded, that treaties should be concluded with foreign powers. Usually such matters have taken their normal and constitutional course. But the gradual absorption of power in the hands of the executive is shown by the history of those kinds of international agreements which, as our author says, do not have to be submitted to the Senate for its advice and consent. Passing by such matters as postal, copyright, and trade mark conventions, and reciprocity agreements, one should not miss the significance of agreements entered into by the President, without the participation of the Senate, for the settlement of pecuniary claims of our citizens against foreign governments, or the protocol submitted to the Mexican commissioners at the session at Atlantic City in 1916, or the agreement which

President Roosevelt made in 1905 with Santo Domingo for putting the custom houses of that island under American control. "There are numerous devices," says Professor Corwin, "resorted to in ordinary diplomatic correspondence which frequently yield what are tantamount to agreements: a mere exchange of notes, such as took place in 1899 and 1900 between our State Department and the governments of Great Britain, France, Germany, Russia, Italy, and Japan with reference to the 'open door' policy in China; and exchange of what are called identical notes, such as took place November 30, 1908, between the United States and Japan, whereby the two governments pledged their continued fidelity to the maintenance of the integrity of China and of equal commercial opportunity throughout the Chinese Empire for all nationalities [and again in 1917]; the 'gentlemen's agreement,' a new invention, such as that which at present regulates Japanese immigration to this country; and finally, the *modus vivendi*, such as that which for more than a quarter of a century, after the termination of the Treaty of Washington in 1885, defined American fishing rights off the coasts of Canada and Newfoundland."

But the Senate has been very jealous of its constitutional right to share in the making of treaties, properly so called, and has often frustrated the plans of the executive, and there are some who think that it has gone much beyond the limits of its rightful power in the remodeling of treaties submitted to it. True, the making of a treaty must be "by and with the advice and

consent of the Senate." But while consent is manifested by a sufficient number of votes, advice is something which may be freely offered but which the recipient is equally free to reject. Yet the Senate has grown into a habit of dealing with a treaty submitted to it for approval—and it may be one which was very carefully drawn and the fruit of long and difficult negotiation—as simply to much raw material, out of which to fashion a treaty according to its own ideas, the changes being called "amendments." Professor Corwin alludes in passing to this practice. But it has happened more than once that a treaty of paramount importance in our international relations has been so overloaded with amendments that the discouraged executive, aware that the consent of the Senate cannot be obtained without incorporating the amendments, and aware, on the other hand, that the amended treaty would be utterly unacceptable to the foreign power, has simply let the matter drop. This happened to President Taft in his endeavor to secure general arbitration treaties. In a recent volume he says: "I have been greatly interested in securing the adoption of general treaties of arbitration to dispose of all justiciable questions that are likely to arise between the nations. I attempted to secure the ratification by the Senate of treaties of this kind which I had made with France and England. The Senate refused to confirm the treaties except with such narrowing amendments that it seemed to me futile to attempt to negotiate them." It was recently stated (and it certainly was at one time true) that "it is practically impossible

for a President, however intelligent and patriotic, to get a treaty confirmed against which a small body of senators have any objection." Is it not precisely in this fact that we are to find the explanation of "gentlemen's agreements" and other informal, not to say devious, methods of concluding agreements with foreign powers? Any fixed habit of the United States Senate is practically ineradicable. But on the letter of the Constitution, the practice of remodeling treaties cannot be defended. The President's appointments to office are also required to be made with the advice and consent of the Senate. Yet the Senate has never construed its "advice" in this matter to be anything more than personal and individual advice privately given. It would be a case exactly parallel with its dealings with treaties if the Senate, on receiving the nomination of Mr. A. to a certain office, should amend it by striking out the name of Mr. A. and substituting that of Mr. B.

Professor Corwin's final conclusion is that "the principal fruits of the doctrine that the control of foreign relations is an executive prerogative may be summarized thus: An unlimited discretion in the President in the recognition of new governments and states; an undefined authority in sending special agents abroad, of dubious diplomatic status, to negotiate treaties or for other purposes; a similarly undefined power to enter into compacts with other governments without the participation of the Senate; the practically complete and exclusive discretion in the negotiation of more formal treaties, and in their final ratification; the practically

complete and exclusive initiative in the official formulation of the nation's foreign policy. Meanwhile, Congress has established its practically exclusive right to abrogate treaties, both in their quality as law of the land and as international agreements; and recently it has asserted a highly questionable supervision over diplomatic grades. Its alleged right of recognition has, however, remained a mere shadow. On the whole, therefore, the net result of a century and a quarter of contest for power and influence in determining the international destinies of the country remains decisively and conspicuously in favor of the President. It is an outcome calculated to give pause to those who harp so unceasingly at 'secret diplomacy,' to say nothing of those who would wage wars by referendum. For if a nation situated as America has been in the past has found it necessary to center the control of its foreign policies more and more in the hands of one man, what of European states? One may avoid fatalism and yet cherish the conviction that historical institutions are seldom correctly assessed in indiscriminate abuse."

* * *

STUDIES IN THE PROBLEM OF SOVEREIGNTY. By Harold J. Laski, of the Department of History in Harvard University. New Haven: Yale University Press, 1917.

In this volume, Professor Laski has made a brilliant and most interesting contribution to the philosophical attempt to work out a logical and completely defensible definition of sover-

eignty. Rejecting the Hegelian conception of the state as sovereign in the sense of being a supreme and self-existent being, superior to all its citizens, and upon whose mere will their lives and destinies must ultimately depend, he equally refuses to admit the purely individualistic doctrine, in which the state is no more than a voluntary relationship among its citizens, and they the collective sovereign. It is not easy to make a summary of the author's keen and well-rounded argument without doing it injustice. But essentially, he denies that there must be in each state a legally determinate superior whose will is certain of acceptance; he thinks that we must "find the true meaning of sovereignty, not in the coercive power possessed by its instrument, but in the fused good will for which it stands." "If we become inductive minded and make our principles grow out of the facts of social life, we shall admit that the sanction for the will of the state is going to depend largely on the persons who interpret it." And "the will of the state obtains pre-eminence over the wills of other groups exactly to the point where it is interpreted with sufficient wisdom to obtain general acceptance, and no further." In the last analysis, therefore, sovereignty means no more than the ability to secure consent. But the state is only one of the groups to which the individual belongs, and the others likewise have their real existence, their rights, and their claims upon his allegiance. "You must place your individual at the center of things. You must regard him as linked to a variety of associations to which his personality

attracts him. You must on this view admit that the state is only one of the associations to which he happens to belong, and give it exactly that pre-eminence, and no more, to which, on the particular occasion of conflict, its possibly superior moral claim will entitle it. In my view it does not attempt to take that pre-eminence by force; it wins it by consent. It proves to its members by what it performs that it possesses a claim inherently greater than, say, their church or trade-union." But it is pertinent to remark that if the state is sovereign only in the same way and on the same basis as the other group units, the state is just as much bound to keep its hands off their privileges and the control they exercise over their members as they are to obey the laws which the state makes. If the state, the municipality, the church, the whist club, the trade union, and the I. W. W. are all sovereign, how can the permanence of political institutions or private rights be hoped for in a

world which is still ruled, unhappily, not by philosophical ideals, but too largely by coercion?

Professor Laski's method is historical, and he has used for his material chiefly the ecclesiastical history of the last century, drawing lessons from such movements as disestablishment in Scotland, the Oxford movement, and the Catholic reaction in France. Thus it is that, instead of the political philosophers of the past and of more recent ages, the prominent figures in his book are Newman and Manning, De Maistre and Bismarck. But his argument is that the problem they all severally dealt with is an eternal one, and his purpose is to indicate the change in the emphasis given to it in the course of modern history. A word of praise must be given to the excellent typographical style and appearance of the work. It is thoroughly in keeping with the very superior models which we have come to expect from the Yale University Press.

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By THE NATIONAL ASSOCIATION FOR CONSTITUTIONAL GOVERNMENT

The National Association for Constitutional Government was formed for the purpose of preserving the representative institutions established by the founders of the Republic and of maintaining the guarantees embodied in the Constitution of the United States. The specific objects of the Association are:

1. To oppose the tendency towards class legislation, the unnecessary extension of public functions, the costly and dangerous multiplication of public offices, the exploitation of private wealth by political agencies, and its distribution for class or sectional advantage.

2. To condemn the oppression of business enterprise,—the vitalizing energy without which national prosperity is impossible; the introduction into our legal system of ideas which past experience has tested and repudiated, such as the Initiative, the Compulsory Referendum, and the Recall, in place of the constitutional system; the frequent and radical alteration of the fundamental law, especially by mere majorities; and schemes of governmental change in general subversive of our republican form of political organization.

3. To assist in the dissemination of knowledge regarding theories of government and their practical effects; in extending a comprehension of the distinctive principles upon which our political institutions are founded; and in creating a higher type of American patriotism through loyalty to those principles.

4. To study the defects in the administration of law and the means by which social justice and efficiency may be more promptly and certainly realized in harmony with the distinctive principles upon which our government is based.

5. To preserve the integrity and authority of our courts; respect for and obedience to the law, as the only security for life, liberty, and property; and above all, the permanence of the principle that this Republic is "a government of laws and not of men."

The Constitution of Canada in a War-Time Election PART I.

By William Renwick Riddell, LL. D., F. R. Soc. Can., etc.

Justice of the Supreme Court of Ontario.

The actual working of the Constitution of Canada is as well shown in a recent general election as in any occurrence of recent years.¹

The British North America Act of 1867 (30, 31 Vict., c. 3, Imp.), with its amendments, may be called the written Constitution of Canada, but one who confined his attention to the written Constitution would have a very erroneous and imperfect view of the real Constitution. As I have more than once pointed out, even the "word 'constitution' carries with it a different connotation in English and in American usage, and we in Canada follow the English. In our usage, the Constitution is the totality of the principles more or less vaguely and generally stated upon which we think the people should be governed; in American usage, the Constitution is a written document containing so many words and letters, which authoritatively and without appeal dictates what shall and what shall not be done. With us anything unconstitutional is wrong, no matter how legal it may be. With the American,

anything which is unconstitutional is illegal, no matter how right it may be. With the American, anything which is unconstitutional is illegal; with us, to say that a measure is unconstitutional rather suggests that it is legal but inadvisable."²

The British North America Act was the production of statesmen of Canada, devised and drawn by them without interference or aid from those of the mother country. It set out what the colonies desired, and was passed word and letter as so drawn. In form it was an act of the Imperial Parliament; in fact it was a compact between the Provinces forming the Dominion.³ Whatever the theories of the people of the Thirteen Colonies or their successors, there can (for a British subject) be no doubt of the legal power of the Imperial Parliament to enact valid legislation for all British possessions; and it was found necessary to seek the aid of that Parliament to give a binding character to the compact and its provisions.

¹ A general election is an election common to all Canada, at which the members of the House of Commons are chosen; with negligible exceptions, the elections for all constituencies are held on the same day, fixed by the Governor-in-Council, that is, by the Government of the day. See Revised Statutes of Canada (1906) c. 6. A special election or by-election is one held in a constituency by reason of a vacancy in its representation by death or otherwise. R. S. C. (1906), c. 11, Secs. 9 et seq.

² "The Constitution of Canada in its History and Practical Working," Yale University Press, 1917 (The Dodge Lectures, Yale University, 1917) p. 52. See also my judgment in *Bell v. Burlington*, (1915) 34 Ontario Law Reports, 619 at p. 622 (Appellate Division of the Supreme Court of Ontario).

³ A reasonably full account of the genesis of the British North America Act will be found in a paper of mine read before the Royal Society of Canada last year and printed in the Transactions of the Society for 1917, Section II, pp. 71 et seq. The authorities are referred to with particularity in that article.

Other Provinces were added to the Dominion on terms arranged with them, and three new Provinces were formed out of the territory acquired by the Dominion. (Those interested will find an account of the accretions to the Dominion in my Dodge Lectures, cited in note 2, pp. 28, 50, 51.) Prince Edward Island and British Columbia were added as Provinces to the original four, Ontario, Quebec, New Brunswick, and Nova Scotia, by Imperial power; Manitoba, Saskatchewan, and Alberta were created by the Dominion under powers given the Dominion by Imperial legislation—all this was in fact Canadian, though in form part was Imperial.

The Parliament agreed upon and provided for by the British North America Act consisted of two houses, the Senate, whose members were to be appointed by the Government for life, and the House of Commons, whose members were to be elected. (Sections 17, 24, 37.)

"Every House of Commons shall continue for five years . . . (subject to be sooner dissolved by the Governor and no longer.)" (Section 50.)

The Twelfth House of Commons had been elected in 1911, when Sir Wilfred Laurier went down to defeat

on the reciprocity issue, and it must needs come to an end in 1916, unless an amendment were made in the British North America Act. There had been considerable talk about the Governor dissolving the House before it should come to an end by lapse of time. This suggestion was, however, (speaking generally), confined to a section of the Conservative party, the party in power; the greater part of the Conservatives and practically all the Liberals were opposed to a wartime election, and the scheme did not meet the approval of the Administration.⁴

In 1916, the war continued to be actively waged, and all the resources of Canada were devoted to its successful prosecution. It was thought unwise to dissipate the energies of the nation and rouse the antagonisms which would naturally result from an election. Accordingly the Prime Minister, Sir Robert L. Borden, proposed that the term of the existing House of Commons should be extended. The Canadian Parliament had no power to do this; an attempt to do so would be "unconstitutional" in the American sense of the word and therefore ineffective.⁵ In proposing a resolution for an Address to the King for an amendment to the British North America

⁴ While in form the Governor-General has the power to dissolve the House of Commons, in this as in all other official acts he is a *roi fainéant*; like the King, all his official acts are determined by the Ministry who have the confidence of a majority of the House of Commons, and he must always find a Ministry responsible for such acts. The Governor is a *lucius a non lucendo*, called the Governor because he does not govern. This is one of the things in our Constitution which are difficult of comprehension by Americans, accustomed to find the powers of their officers in written form in some document, and accustomed to governors who are such in fact and not merely in name. (See my Dodge Lectures, pp. 89 et seq.) Nay, even the word "Ministry" is not found in the written Constitution, the British North America Act!

⁵ What the American calls "constitutional" and "unconstitutional" we call *intra vires* and *ultra vires*. The American use is, however, sometimes met with, and even in the halls of Parliament. Occasionally a barrister has been known to transgress; this is not to be wondered at where, as in our courts, American decisions are cited freely and treated with respect.

Act extending the term of the House of Commons for a year, the Prime Minister said: "It is a motion which we should not press if the honorable gentlemen on the other side of the House should oppose it as a party," and "I entirely admit that no extension should be asked unless it appears to have the support of public opinion, and unless it is approved by both political parties."⁶ While asserting confidence in the result if an appeal to the electorate should be made, the Prime Minister thought it "in common with a great majority of the Canadian people, a duty to take every possible step and to use every legitimate means to prevent" the necessity of an election "during the continuance of the war." (House of Commons Debates, 1916, p. 629.) The Opposition, led by Sir Wilfrid Laurier, agreed to the resolution, Sir Wilfrid Laurier saying "if Germany wins, nothing on God's earth would matter," and in reference to the necessity of a unanimous request, "the British Parliament,

I am sure, will never under any circumstances alter the Constitution of this country except upon a unanimous resolution of the two branches of the Canadian Parliament." (Idem., pp. 632, 634.) The Senate concurred after a little grumbling in English and French by certain opposition Senators. (Senate Debates, 1916, unrevised edition, pp. 59 et seq.) The Hon. Mr. Legris said: "Je crois que le Gouvernement n'aurait pas du hesiter a soumettre sa politique aux electeurs du pays, au lieu de se faire donner un extension de pouvoir," but he did not divide the House. Accordingly a joint Address of Senate and Commons was transmitted to the Home Administration.⁷ The result was an Act of the Imperial Parliament, passed *totidem verbis* as in the Address, extending the term of the Twelfth Parliament of Canada until October 7, 1917. (6, 7 Geo. V, c. 19, Imp.)

Unfortunately the war did not come to an end before that day, and the Government were faced with the alterna-

⁶ Official Report of the Debates of the House of Commons for 1916, Vol. 122, pp. 622, 625 (Revised Edition). This is an official publication and is generally known as "Hansard."

⁷ It may be thought worth while to set out this address in full: "Resolved that an humble address be presented to His Most Excellent Majesty the King, in the following words: To the King's Most Excellent Majesty: Most Gracious Sovereign: We, Your Majesty's most dutiful and loyal subjects, the Senate and Commons of Canada in Parliament assembled, humbly approach Your Majesty praying that you may graciously be pleased to give your consent to submit a measure to the Parliament of the United Kingdom to amend the British North America Act, 1867, in the manner following or to the following effect:

An Act to amend the British North America Act, 1867. Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

1. Notwithstanding anything in the British North America Act, 1867, or in any Act amending the same, or in any Order in Council, or terms or conditions of union, made or approved under the said Act, or under any Act of the Canadian Parliament, the term of the Twelfth Parliament of Canada is hereby extended until the seventh day of October, 1917.

2. This Act may be cited as the British North America Act, 1916, and the British North America Acts, 1867 to 1915, and this Act may be cited together as the British North America Acts, 1867 to 1916.

All of which we humbly pray Your Majesty to take into your favourable and gracious consideration."

tive of another extension or a general election. It is true that under the British North America Act they could govern Canada without an election for some months, but there was necessity for Parliament to meet at least once a year "so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session." (British North America Act, sec. 20.) Unless its life were extended, Parliament could not sit later than October 7, 1917, and a new House of Commons must be ready to sit October 7, 1918.

The Ministry determined to give Parliament the choice, and on July 17, 1917, the Prime Minister presented to the House of Commons a motion for a Joint Address for a further extension of the life of the Parliament for one year. (The motion was really presented on July 16, but at the instance of a private member of the House the consideration of the resolution was deferred. House of Commons Debates for 1917, unrevised edition, pp. 3557, 3558. The debate in the House will be found at pp. 3593 et seq.) He advanced the same considerations as had prevailed in 1916, cited the example of

the existing Imperial Parliament, which had extended its life on three successive occasions,⁸ and that of New Zealand, which had extended its life till December 19, 1918; and after pointing out that we had about 300,000 men overseas, he suggested that all that was desired was for once to make the term of the Canadian Parliament the same as Great Britain had for more than a century and a half. But he said that if the resolution were not carried by a unanimous or practically unanimous vote, he would not press the matter further. The proposal was not accepted by Sir Wilfrid Laurier, the leader of the Opposition, who desired a vote of the electorate on the question of compulsory military service, conscription. The parties split. All those opposed to conscription, including practically all the French Canadians, voted against extension, French Canadians constituting by far the greater number (not all) of those so voting. The resolution carried, 82 to 62, there being 10 pairs. The next day, July 18, 1917, the Prime Minister said that the vote showed something very far short of unanimity or practical unanimity, and the Government did not propose taking any fur-

⁸ Before the present war the British Parliament had once extended its own life. (I do not notice the anomalous case of the Long Parliament.) The Act of 1694, 6 W. & M., c. 2, had limited the life of a Parliament to three years; in 1716, a Parliament elected under this law, on the accession of George I, extended its own life and the life of subsequent Parliaments to seven years by the Act of 1 Geo. I, St. 2, c. 38, the well-known Septennial Act. There can be no doubt of the power of the Imperial Parliament to repeal any statute limiting its life, whether that statute was passed by itself or by any previous Parliament. See my judgment in *Smith v. London* (1909), 20 Ontario Law Reports, 133, at p. 142, "Parliament has no power to control by anticipation the actions of any future Parliament or of itself." In 1716, the state of matters in Britain was very unsettled and precarious. The Pretender had invaded the kingdom in the '15 affair, and the justification for the Septennial Act was that the measure was necessary for the public security and the tranquillity of the state. Otherwise it would have been unconstitutional (in the English sense of the word), although perfectly valid.

ther action upon the resolution. Parliament came to an end, and there must be an election.

Let us pause here and examine the working of the Constitution, written and unwritten. The British North America Act, as I have said, was the result of a compact; it was the work of colonial statesmen, to which legal validity was given by an Act of the Imperial Parliament. The reason of some of its provisions is historical, and cannot be fully appreciated without some knowledge of the confederating Provinces.

Lower Canada, now the Province of Quebec, had (and has) a population largely French by descent and language; while her criminal law was substantially the same as that of England and the English-speaking Provinces, her civil law was based upon the *Coutume de Paris*. The other Provinces were (and are) largely English-speaking and of British descent. Their civil law was based upon the common law of England. Moreover, Lower Canada was very largely Roman Catholic, and the Roman Catholic Church had special privileges; the other Provinces were predominantly Protestant. Lower Canada had her "peculiar institutions," and was never quite free from the dread that she might sometime be forced into a legislative union which would enable the English-speaking people to destroy her cherished institutions. (Some of the French Canadian newspapers even now have or affect to have the same fear. Lord Durham had recommended a legislative union in his celebrated Report, pp. 226, 227.) Accordingly a federal union was agreed

to; the Provinces were given full power of legislation in matters of local moment, and the Dominion the remainder. The Provinces were given the power to amend from time to time the Constitution of the Province (except as regards the office of the Lieutenant Governor—British North America Act, sec. 92), but the Dominion was not. While no harm could accrue to any Province by the amendment of the Constitution of any other, the amendment of the Constitution of the Dominion was a different matter. Accordingly, when the unanimous agreement of the colonial statesmen that the life of the Canadian House of Commons should be five years, was incorporated in the British North America Act, there was no power given to the Canadian Parliament to change it; only one Parliament could do that, the Imperial Parliament at Westminster. Remembering that the British North America Act was a compact, not a gracious grant by the home Parliament, it necessarily follows that in all fairness there should be no change in the Act unless the parties to the compact agreed to it; and it equally follows that any change desired by the contracting parties should be made as of course. Each constituency in Canada sends a member to represent it in the House of Commons. Each section of the Dominion has so many Senators. If these members and Senators agree on any amendment, it is made; no change is made without a practical unanimity; of course, a small group of wilful men ought not to be allowed to prevent what practically all the people desire.

It is from not remembering the difference between the form and the substance that many fail to understand our institutions. The British North America Act is looked upon (as indeed it is *in law*) as an exercise of power by the superior authority conferring rights upon an inferior: *in fact*, the colonies had substantially all these rights before, and the Act is simply putting in systematic and legal form what they had decided upon. And the same remark applies to amendments. The form which the proceedings took may also be considered briefly. While in form, as we have seen, the Governor decides if and when to dissolve Parliament, it is the Ministry who make the decision. In almost all instances since Confederation, Parliament has been dissolved at the end of its fourth session.⁹ Parliament is dissolved at the time the Ministry in power think best, and there is no constitutional objection to dissolution at any time. The expression of the desires of Canada for an extension of the life of a Parliament takes the form of an humble¹⁰ Address to the

King. The King never hears of it; it goes to the office of the Colonial Secretary, who causes a bill to be drawn up in the terms of the Address, and the bill is passed (generally without debate) by the Houses of Parliament, and receives the Royal assent—an assent the Sovereign may in theory withhold, but which has not in fact been withheld since the time of Queen Anne.¹¹ No extension having been asked for, an election comes on.

(Note by the Author on amendments to the Constitution of Canada.) A reviewer in *The Nation* says that "the Constitution of Canada cannot be altered save by a Parliament in which Judge Riddell and his fellow-Canadians have no representation whatever." This is rubbish. (N. B.—I use the term "rubbish" just to get even with the reviewer for calling a statement of mine "rigmarole," and to show him that I, too, can on occasion show bad manners, not in the least to be offensive or to hurt his feelings—who am I that I should find fault with a

⁹ The Seventh Parliament was an exception. It expired by lapse of time after its sixth session in 1896. At the ensuing general election, Sir Wilfrid Laurier was returned to power and he held his place as Prime Minister till the reciprocity election of 1911.

¹⁰ With a tolerably long and extensive acquaintance with Canadian legislators, I have never yet met one who was humble. But convention is supreme in affairs of state; and even in private communications we still are the "humble servant" of a "Dear Sir" whom we detest and whom we have no thought of serving.

¹¹ I venture to think that quite too much is made by many of the so-called constitutional amendment to the British Constitution which drew the teeth of the House of Lords (1911) 1, 2 Geo. V, c. 13. This has been called the most revolutionary change in the British Constitution since the time of William of Orange (see *The Constitutional Review*, October, 1917, p. 142), and spoken of in other similar superlative language. But the statute is not part of the Constitution of Britain in the same sense as a clause in the Constitution of the United States. The American Constitution is binding upon Congress; Congress cannot repeal or amend it. But the British Act is not much more than a rule of practice; Parliament passed it; Parliament may amend or repeal it. It is at most not very different from an Act of Congress which was passed after two exciting general elections—as Congress on a mandate from the people passed it, so Congress can amend or repeal it—or a rule of court, binding upon the court and all its members till repealed, but which the court can repeal at will.

reviewer?) The form is as the reviewer thinks, the substance and the fact far different. (Moreover, I am not sure that my friend may not some of these days find himself deprived of the ante-prandial cocktail by the action of certain legislatures "in which he and his fellow-New Yorkers have no representation whatever," or if he live in some other city it may happen that his wife will be enabled to neutralize his vote through the action of legislatures in which he has no representation whatever.)

I have frequently been asked what would happen if the Imperial Parliament were to attempt to exercise its legal authority over Canada against the wishes of Canada. I have generally replied by saying: "I will tell you if you will tell me what would happen if a wholly illiterate full-blooded negro were elected President of the United States." The invariable answer is: "That is impossible," and mine: "That is the answer." One Bunker Hill was enough: the mother country learned the lesson once for all that the people of our race will govern themselves whether for good or ill. The fullest measure of self-government has been cheerfully granted, and there is no disposition to interfere in any way. This helps to account for the devoted love of Canada for her great mother across the sea, a love shown in every way and on every occasion—perhaps our contribution of 425,000 volunteers for the present war may be considered some evidence of it, a number equivalent to 6,000,000 in the United States.

There never has been an amendment to the British North America Act which did not follow the precise wording of an Address of the Canadian Parliament; there never has been an amendment refused which was asked for by Canada. It may be of interest to mention the amendments:

1. (1868) 31, 32 Vict., c. 105 (Imp.) When the Dominion was in contemplation it was thought that eventually all British North America would be consolidated. The Hudson Bay Company had by letters patent from Charles II certain rights not accurately defined or definable in an enormous tract of territory of great value. The Canadian statesmen inserted in the British North American Act (sec. 146) a provision that it should be lawful for Her Majesty on an Address from both Houses of the Canadian Parliament to admit "Rupert's Land and the North Western Territory" into the Union on terms to be expressed in the Address. Canada bought out the Hudson Bay Company for £300,000, 50,000 acres of land and 5 per cent of all land that might be laid out for settlement within fifty years; and the Canadian Parliament presented an Address, resulting in the Act which ultimately made this great region part of Canada. 193 Hansard (3d series), pp. 998, 1101.

2. (1869) 32, 33 Vict., c. 101 (Imp.) An Act enabling the Treasury to guarantee a loan by Canada to pay off the Hudson Bay Company and prohibiting Canada from impairing the priority of the charge upon her Consolidated Revenue Fund.

3. (1870) 33, 34 Vict., c. 82. A similar Act to guarantee a loan to construct fortifications. These two are not really constitutional amendments, but simply put in legal form contracts between the Imperial Government and that of Canada.

4. (1871) 34 Vict., c. 28 (Imp.) The Canadian Parliament had, by the Acts 32, 33 Vict., c. 3 (Can.) and 33 Vict., c. 3 (Can.), provided for the formation of a new Province, Manitoba, out of part of the newly acquired Hudson Bay Territory; but it was not clear that the power to do this had been given by the British North America Act. On an Address by both Houses of the Canadian Parliament (206 Hansard, 3d Series, p. 1171), the said statutes of Canada were declared valid, and power to create Provinces, etc., was expressly given.

5. (1873) 36, 37 Vict., c. 45 (Imp.) was an Act respecting guaranty of Canadian loans, like Nos. 2 and 3 above.

6. (1875) 38, 39 Vict., c. 53 (Imp.), an Act giving effect to a Canadian Act raising perplexing questions as to copyright. This statute would require a treatise to explain fully. Those interested may consult 226 Hansard (3d Series) at the places given in the index under "Canada Copyright Bill," also the Canadian Debates, 1875, at the places given in the index under "Copyright Bill."

7. (1889) 52, 53 Vict., c. 28 (Imp.) When the Dominion in 1876 set off the Territory of Keewatin, the eastern boundary of the new territory was fixed at the western boundary of the

Province of Ontario. The Territory of Keewatin was put under the jurisdiction of the Province of Manitoba. This Province claimed as part of the new territory a large area which Ontario had always considered her own. The dispute became acute; the Dominion supported the claim of Manitoba (it would perhaps be more accurate to say that the claim was made by the Dominion and Manitoba was a mere instrument). It was at length agreed that it should be referred to arbitration to determine the true west and north boundary of Ontario. Robert A. Harrison, Chief Justice of Ontario (who took the place of William Buell Richards, the former Chief Justice of Ontario, who had been first appointed by the Province), Sir Francis Hincks, a Canadian financier and Finance Minister (named by the Dominion in the place of Lemuel Allen Wilmot, their first nominee), and Sir Edward Thornton, British Minister at Washington (named by both Dominion and Province) acted as arbitrators. Their award, made in 1878, was unanimous in favor of the Province of Ontario. The Province of Ontario at once accepted the award and passed legislation to bring it into effect, (1879) 42 Vict. (Ont.), c. 2; but the Dominion refused to give effect to the award by similar legislation. (The governments of the Dominion and of the Province of Ontario were of different politics, and it was freely charged, perhaps with some truth, that this difference had no little to do with the refusal.) The governments concerned, ultimately and to put an end to the controversy, agreed to have the question disposed of by the

Judicial Committee of the Privy Council, the final court of appeal for the Empire. The matter was laid before the Judicial Committee in the form of a special case signed by the Attorneys-General of Ontario and Manitoba. The Committee heard counsel for the Dominion, Ontario, and Manitoba, and decided, August 11, 1884, (1) that the award was not binding without Dominion legislation, but (2) that the award was substantially accurate, and advised further legislation. The Dominion thought it advisable that Imperial legislation should be had, and an Address of both Houses of Parliament was sent to Westminster accordingly, resulting in this Act which settled the boundaries of Ontario. The Address is set out in the Schedule to the Act.

8. (1895) 59 Vict., c. 3 (Imp.). The Canadian Parliament had in 1894 passed an Act providing for the appointment of a Deputy Speaker during the absence or illness of the Speaker of the Senate. 57, 58 Vict., c. 11 (Can.) The British North America Act (sec. 34) provided only for a Speaker of the Senate. It seemed doubtful whether the Canadian Parliament could validly provide for a Deputy Speaker. At the request of the Canadian Parliament their legislation was expressly confirmed. Senate Debates (1894), pp. 224, 266; 36 Hansard (4th Series), pp. 1113, 1175, 1518, 1674, 1742. (Even Dr. Tanner and T. M. Healy agreed that preliminary printing might be dispensed with for this bill.)

9. (1912) 2, 3 Geo. V, c. 10 (Imp.), giving power to the Home Administration to extend prohibition of captur-

ing seals to Canada "with the consent of the Governor-General in Council," i. e., the Ministry responsible to the House of Commons and the people of Canada. This is scarcely a constitutional amendment, however.

10. (1915) 5, 6 Geo. V, c. 45 (Imp.) In view of the great increase in population and wealth of the western Provinces of Canada, it was deemed advisable to increase their representation in the Senate. An Address of both Houses of Parliament was accordingly presented, and this Act was passed *totidem verbis*. House of Commons Debates, 1915, pp. 1459 (where the Address is set out in full), 2327 et seq.; 71 Hansard (5th Series), p. 1619.

11. (1916) 6, 7 Geo. V, c. 19. Of this we have already spoken.

It will be observed that some of the above are not strictly constitutional amendments. I have, however, added them for the sake of completeness. Other statutes of the Imperial Parliament may perhaps be cited which refer to Canada more or less directly; it will be seen how carefully the rights of Canada have been guarded. (1901) 1 Edw. VII, c. 31; (1906) 6 Edw. VII, c. 20; (1911) 1, 2 Geo. V, cc. 36, 47.

How far a Canadian Province can go in the way of amending its constitution is shown by the Alberta act (1917) c. 38, which made twelve members of the existing Legislative Assembly (the only House of Parliament in that Province), who were in active service, members of the Legislative Assembly about to be elected and for the same constituency. In the present year, 1918, the Legislative Assembly of Ontario (our

only House of Parliament) has extended its life "until after the close of the present war, the return of the Canadian forces serving overseas with the military and naval services of Canada and of Great Britain and her Allies, and until one year has elapsed and a session of the Legislature has been held after a date certified by the Minister of Militia and Defence or declared by the Governor in Council to be the date of the return of the last of such forces transported from overseas by the Government of Canada."

In Newfoundland—not a part of Canada, but a separate colony—the Parliament has by the act (1917) 8 Geo. V, c. 19, extended its life to a day in 1918 to be fixed by the Government, and has limited the power of the Leg-

islative Council (the second house) in practically the same manner as the power of the House of Lords was limited by the celebrated Imperial Act, 1, 2 Geo. V, c. 13. Alberta and Saskatchewan have both given representation to their new Parliaments to soldiers and nurses on active service who elected their representatives themselves, three in Saskatchewan (one of them a woman) and two in Alberta. Alberta went even further. The Legislature of 1917 before dying enacted that twelve persons named being members who were on active service should be members of the next House without an election at all, and should in that House represent the constituencies for which they sat in the existing House.

(To be continued.)

The Proposed Prohibition Amendment

By Frank Warren Hackett

The writer, when a boy at school, was one day set to work to reproduce in a copying-book, with pen and ink, a line which read: "Eternal vigilance is the price of liberty." Not to speak of the chirographic results, it is certain that the sentence, though repeated bravely down the page, conveyed to the juvenile mind no idea whatever. Later on the words, when occasionally met with, engendered a thought that here we have a platitude, which no doubt served a useful purpose in the early days of the republic, but which has passed into obscurity as of no moment in a progressive era, such as our country is now enjoying. Within a few years last past, however, some of us elders at least have awakened to a conviction that the expression sets forth a profound truth. After all, is not vigilance today demanded of an American citizen? Yes; constant watchfulness upon the progress of public affairs is a duty that no true citizen thinks of shirking. The success or failure of a democratic form of government is yet on trial. No man is really fit to vote who does not seek to ascertain what ought to be his conduct with regard to public questions, some of them of gravest import. He must apply himself to learn what is going on at his State capital and at Washington. He should be well aware of what projects of reform are agitated, and what may reasonably be expected to result in the event that any of these proposed changes are actually brought about.

But some one is heard to say: "This is asking too much of the average citizen. He can leave to the few individuals who are specially interested the office of watching legislative doings and of listening to harangues from the reformer. It is enough if the worthy man of business read his daily newspaper and acquire a glimmering notion of what blessings the ardent progressive with a fine confidence stoutly promises. No; this is not enough. The devotee of ledger and bank-book will sooner or later be called upon to cast a ballot; and he ought not to do it until after he has acquired an intelligent conception of what the act signifies. We are not now speaking of a local election, where the ticket represents a choice of candidates previously determined upon, and where the voter "goes with his party." We confine our remarks to the question of a submission to voters whether this or that proposed change in the law shall be effected. More particularly, we have in mind amendments to the Federal Constitution, or to that of a State. Such a proposal, involving the welfare of the people for years to come, should be acted upon, it is hardly necessary to observe, only after deliberation and a fairly complete understanding of whither it leads. Ours is a government by the people. Let the people understand just what they are doing!

Space does not permit entering upon the interesting question of the extent of information possessed by the average American citizen as to the funda-

mental principles of the Constitution of the United States. Frankly, there is ground for believing that widespread ignorance exists as to the powers that can be exercised by the General Government, and as to the relation of that Government to the several States. Not many Americans, even those who are well educated, entertain clear ideas upon this subject. True, some lawyers and some men in public life, a few college professors, or students of American history, with here and there a business man of an inquiring turn of mind, have made themselves familiar with the origin and meaning of the several articles of the Federal Constitution, and are no strangers to the admirable working of its provisions, and the reasons therefor. But the great mass of the people, it is to be feared, have but a vague idea of what the provisions of that wonderful instrument are; still less do they know what, from the days of John Marshall down, the Supreme Court of the United States, from time to time has declared to be their true meaning.

We advance this statement in no spirit of fault-finding. It is, we think, perfectly true. Nor is it surprising that such should be the fact. Most of us are content to live along in the belief that our free institutions are protecting us as a matter of course; and that they will continue to bless our posterity, without our troubling ourselves to inquire whence they came or what obligation rests upon each one of us to see to their support. None the less it is needful to read the Constitution and gain a fair knowledge of what its pro-

visions mean before undertaking to decide whether it ought to be amended.

Realizing how scanty is the knowledge of the principles of the Constitution of the United States possessed by what may be termed the average voter and how readily, owing to such lack of knowledge, he may be persuaded that a proposed change in, or the addition of a new article to, that Constitution will give to "the people" rights which they do not now enjoy, and, further, how easily convinced that the new gift will surely bring about most beneficent results—a few gentlemen at Washington, in April, 1914, took steps to form a society which has now become the National Association for Constitutional Government. This association today has more than six hundred and fifty members, representing every State in the Union save one.

The founders of the association saw danger in the laxity and indifference with which the people of late years have viewed sundry movements in the Congress to amend the Constitution. It was only too evident that those, who ought to be awake, were giving no heed to what was going on. Everybody seemed to be taking it for granted that, inasmuch as the Constitution is the supreme law of the land, our statesmen, judges, professors of constitutional law in the several law schools, and lawyers in their spare time out of court will bear in mind that it shall properly be looked after. When a solitary voice had been heard to give warning that serious danger lurked in a hasty or ill-considered project to amend (and there have been not a few), people generally did nothing other than dismiss thought

of him—alarmist as he was. The field was thus left open to the demagogue. A man who announces himself to be “the friend of the people,” finds it easy to dispose of the conservative as a person of no account, who commits the error of standing in the way of progress and reform.

The National Association for Constitutional Government was brought into being none too soon. Its objects are set forth in the constitution adopted May 6, 1916, as follows: “To propagate a wider and more accurate knowledge of the Constitution of the United States and of the distinctive features of constitutional government as conceived by the founders of the Republic; to inculcate an intelligent and genuine respect for the organic law of the land; to bring the minds of the people to a realization of the vital necessity of preserving it unimpaired, and particularly in respect to its broad limitations upon the legislative power and its guaranties of the fundamental rights of life, liberty, and property; to oppose attempted changes in it which tend to destroy or impair the efficacy of those guaranties, or which are not founded upon the mature consideration and deliberate choice of the people as a whole.”

What more reasonable than to ask that the people be so enlightened as regards a proposed change in the Constitution that the verdict they shall pronounce be deliberately rendered after mature consideration? Every member of the Association, nay, every well-wisher of his country, ought actively to engage in the work of enlarging the number of voters who shall clearly

comprehend what is likely to follow the adoption of a proposed amendment.

Observance of such a duty is specially required at the present time, for nothing is easier than to misconceive the nature of the amendment proposed by a joint resolution passed by the Congress in December, 1917, and popularly known as the “Prohibition Amendment.”

The article reads as follows: “Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited. Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation. Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.”

We purpose to present some reasons why this proposed article ought not to be ratified as an amendment to the Constitution. In so doing we would have the reader understand that no objection whatever is suggested against prohibition itself. Where a State has enacted a prohibitory law, it is to be assumed that her people know best what kind of legislation can be relied upon to check the evils of intemperance. What we object to is a

scheme, in the nature of a departure from complying with what has always been regarded as the true meaning of the Constitution, a scheme which designs to use that instrument for the purpose of accomplishing an end, and applying it to the entire Union, that properly can be reached in no other way than by the action of the people in each State, in the exercise of the police power of that State. This project we think opens up a dangerous course to pursue. A scheme hitherto unheard-of, dangerous in character, we submit, ought not to be allowed to be put into operation.

That two-thirds of the Senate and House have deemed it necessary to propose to the States this amendment would seem to indicate, on the part of those well qualified to pass upon the question, a conviction that it would be well for the nation that the amendment be adopted. (An editorial in the *New York Herald* of January 24, 1918, maintains that the phrase "two-thirds of both houses," in Article V of the Constitution, specifying the majority required to propose a constitutional amendment, means two-thirds of the total membership, and not merely two-thirds of a quorum; and that, tested by this construction, the resolution proposing a prohibition amendment was not legally passed. The point is not without considerable merit.) The legislatures of thirty-six States out of the forty-eight must ratify the proposed article in order to make it valid as a part of the Constitution.

It so happens that several of those who composed the two-thirds in either house really do not themselves believe

that a prohibitory law works well, nor do they believe it desirable that such a law be enforced by Federal officials. There are others who voted in favor of the joint resolution simply because of holding an opinion that there appears to exist a widespread desire of the people for national prohibition, and that opportunity therefore should be afforded for testing the question. Says the majority report of the House Judiciary Committee: "It would seem that whatever may be the individual views of members upon the merits of the moral question involved, the legislative duty to submit is plain. Therefore, the question submitted by this report to the Congress is not whether the manufacture and sale, etc., of alcoholic liquors shall be prohibited, but whether the matter shall be submitted to the States for their determination." The language of Art. V of the Constitution is: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments." Yet it is perfectly well-known that many Senators and Representatives voted in favor of submitting this proposed amendment while at the same time they did not think it "necessary" thus to amend the Constitution. The words just quoted from the House Judiciary Report show how plainly certain members evaded their duty. It may be remarked that eight out of the twenty-one members of the committee reported adversely to the resolution, submitting reasons for so doing.

It is to be borne in mind that the people themselves in the several States do not directly vote upon the question of ratification. Where a legislature al-

ready elected proceeds to deal with the subject, there is, of course, no popular vote. But in States where a legislature will be chosen, an opportunity occurs to obtain from the voters an expression of opinion that can go far toward determining what shall be the action of that particular State. What, then, shall the individual voter do, to whom the chance is offered to register a decision? Let us reply that he cannot too speedily set himself to work to find out precisely what it is that he is called upon to decide. At such a juncture as this, every member of the Association, and, indeed, every man and woman who is concerned that the best interests of our Government, National and State, be conserved, may well talk with friends and acquaintances and disseminate sound views as to the determination of this vitally important question.

We say "vitally important," because, once let this amendment be added to the Constitution, and it probably never can be displaced, notwithstanding it may turn out that national prohibition works badly. Had the language of the article gone no further than to confer power upon the Congress to legislate with regard to the manufacture and sale of liquor, the door would still have been left open for a repeal, should the Congress find it needful. But here is a hard and fast piece of legislation in positive terms. Hence a high degree of care should be exercised before the proposed amendment is voted upon.

Nine out of ten individuals qualified to vote would say offhand: "I am to make up my mind whether it is a good

thing to have prohibition all over the country. I am in favor of a prohibitory law. I do not want my son to be a drunkard. My vote is for ratification." They are perfectly honest, and they imagine that they are performing a duty in taking this attitude. The tenth man is a bit more deliberate. He says: "I do not know about this fixing up the Constitution. Prohibition seems to work well here in our State, though there are stills around, and some fellows get their drink regularly. I am for prohibition, just as my neighbors are. But they tell me that in Pennsylvania they are getting along all right with what they call 'high license.' I guess they know their own business there better than I can tell them. Anyhow, I do not believe it is exactly right for me to try to force prohibition on folks that do not want it. It isn't fair in our State here to dictate to people in another State what to do about liquor selling, any more than it is to tell them how to manage their schools." These common-sense words from our tenth man hit the nail exactly on the head. They sound a note of warning that ought to be heeded.

Let us for a moment suppose that the tables are reversed—that a large majority in House and Senate had become convinced that the people on the whole, after experimenting, have concluded that "local option" is the only practical way of dealing with the liquor question. Suppose an amendment is proposed to the States that local option shall be put into operation all over the country, under regulations to be fixed by the Congress. What would an ardent prohibitionist in a prohibi-

tion State say, when asked how he is going to vote? We strongly suspect that he would denounce the project as an outrageous attempt to force local option upon a State that does not want it. He would insist that any law as to the manufacture and sale of intoxicating liquors should be enacted by the State, and by the State alone, for the State knows best what her own people want.

It is plain, therefore, that the question involved is: Shall the right of a State to enact its own legislation with respect to the manufacture and sale of liquors within its limits be respected and preserved?

Let this all-important truth be kept in mind. Voters are not asked to decide whether in their opinion a prohibitory law or a local option law has proved to be the more efficient in lessening the evils of intemperance. Such an inquiry has already been submitted to the voters in several of the States, and one or the other method has been ventured upon as an experiment. In more than one instance there has been a change from one to the other, after trial made. The voters are dealing with a situation close at home which they understand. Here is where the business of regulating the manufacture and sale of intoxicating liquors properly belongs. Whatever enactment the people see fit to adopt illustrates an exercise of the police power of the State. The State at large, or the county or the town, as the case may be, determines what shall be the regulation. This is local self-government. Will anybody deny that the question

presented to such people as shall have a chance to vote in respect to this proposed amendment is: Shall a State, whether willing or not, surrender her right of legislating upon the subject of the manufacture and sale of liquor? Ought a State, in dealing with the liquor question, to be deprived of her right of local self-government in this particular at the bidding of other States? The inquiry is of transcendent importance.

We shall endeavor to demonstrate that the harm which is threatened in disregarding the spirit and purpose of the Constitution by the adoption of this proposed article is of an effect so far-reaching and so pernicious, that every good citizen should use his best efforts to prevent ratification, never mind what he may think of the desirability or the efficacy of prohibitory legislation in the abstract. We cannot too earnestly insist that the issue must not be obscured by imploring voters to take what may be termed a moral view of the evils of intemperance. A man may be actuated by the best of motives, and yet advocate a course of procedure that shall bring harm, and not good, upon the country.

To begin with, let us remind ourselves that the Federal Constitution (signed in September, 1787) established a legislature, an executive, and a judiciary. The powers which the people gave to those three branches and which the States yielded were enumerated in order that a more perfect union might be formed in the shape of a National Government. They were fundamental powers. They were as

few as possible. The language in which they were granted was concise. Each power was seen to be an absolutely necessary power. To make sure against encroachment by this General Government upon the sovereign rights of the States, Article X of the Amendments (declared in force December 15, 1791) provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." The distinction between the powers of the General Government and those of the States must be kept constantly in mind, that one may duly estimate to what extent the fabric of our National Government rests upon it. It has been from the first, and it ever will be, a very remarkable contrivance, justly admired for the success with which it has worked for more than a century and a quarter. We cannot be too grateful for the skill and wisdom exhibited by the framers of the Constitution. It is for us not lightly to be induced to disturb what has been happily expressed as being "an equilibrium of power between the States and the Federal Government."

The Constitution contains certain grants of power, but there is no legislative enactment. By this we mean that its provisions do not assume to bring into being a rule of law governing individual conduct. (We are leaving out of consideration the amendments adopted as the result of the war for the Union.) To Congress the right is given to make such laws as shall be necessary and proper to carry

into execution the powers vested in the government, but to the State is left the authority to legislate with regard to the conduct of the individual. One sees at a glance that the principle is sustained that a community smaller in territory and population can better determine what manner of law is suited to that particular locality than can men who, however well-disposed, live at a distance, with surroundings, it is likely, of a different nature. This is to repeat what already has been declared, that local self-government must have been designedly retained by the States.

For a considerable period after the Constitution went into operation no such thing as a railroad or a telegraph was known. When these improvements had brought distant parts of the country into closer connection, the process gained headway of strengthening the national government. The war for the Union called forth a broad construction of the powers of Congress. Later, the commerce clause from time to time received at the hands of the Supreme Court a treatment that seems almost to deny a limit to the field in which the right entrusted to the Congress can be applied. As a result, the scope of the activities of the Federal Government has steadily grown, and naturally the people have accustomed themselves to a belief that in a large degree the doctrine of States' rights has properly been superseded, and that it is in a general way to Washington that they are to look for the blessings of progress and reform. Yet with all this change it remains that upon the whole the true

character of the relation between the Federal and the State governments has not been intentionally disregarded. The Constitution of our fathers, revered as it is, still protects the life, liberty, and property of an American citizen; while that of the State provides a protection which affects her people in the daily concerns of life, to the end that the commonwealth "may be a government of laws, and not of men." Who will be heard to contend that the precious right of local self-government retained by the State may properly be taken away by a resort to the amendment clause of the Federal Constitution?

A single word as to the object which the framers of this clause had in view. The process of amending the Constitution was purposely made very difficult. Of the men who drafted the Constitution Justice Story aptly observes: "They knew that the besetting sin of republics is a restlessness of temperament and a spirit of discontent at slight evils." (Story on the Constitution, sec. 1828.) The people of a State, if they choose, can afford to try experiments with their constitution. If a provision turns out not to work well, it does not take long to do away with it. Amend the Federal Constitution (as we have already said) and it becomes well nigh impossible to get rid of the article, no matter how obnoxious it shall prove to be. Of one thing we may be assured, the framers of the Federal Constitution, the people who ratified it, the statesmen, judges, and lawyers who studied its meaning, and who joined in praising its

successful working, all of them took it for granted that a provision for its amendment did not contemplate future radical changes in its nature, a perversion of its fundamental principles. It was universally agreed that to amend went no further than to modify a power already given, or to add a new one of a similar character, which experience might demonstrate to be necessary for carrying on the national government. We are not saying that a ratification by three-fourths of the states of the proposed article now under review cannot legally be effected under the amendment clause. But we object, as already has been stated, that such a procedure will be at variance with the meaning imparted to the amendment clause at the time that the Constitution was adopted.

Before the joint resolution was passed, an objection had been raised by constitutional lawyers in the House and in the Senate that the second and third clauses of the article rendered the proposal to the States illegal, as not in accord with the requirements of Article V of the Constitution regarding amendments. Senator Borah, in a speech in the Senate, December 18, 1917, was emphatic in his declaration that Congress has not the power to limit the time within which an amendment shall be ratified. He doubted whether the procedure was "a real submission."

Of section two, that the Congress and the several States shall have concurrent power to enforce the article by appropriate legislation, it may be remarked that many lawyers think it attempts to put into effect an illegal procedure. On January 11, 1918, the

New York State Bar Association, at their annual meeting, passed a resolution condemning its adoption, and urging Congress to repeal it.

Can we afford to make this abrupt change in our form of government? The burden rests on those who favor the change to satisfy the people that they are to gain by it. Where is the urgent necessity for venturing upon an experiment so hazardous? We have seen no sufficient reason advanced why each State cannot be left to herself to deal with the liquor problem. The following declaration, which is to be found in the report of the minority of the House committee, seems unanswerable: "To determine whether a matter wholly within the police power of the State should be a law is best determined by that State, having full knowledge of its people and conditions, and the very best result is thereby obtained." Not to pursue this line of argument further, we hope that it has been made clear to the reader that an insuperable objection to the adoption of the proposed amendment is, that it violates the spirit of the Constitution; it brings legislation in where it does not properly belong; it offends the people of more than one State, and opens the door to further modifications of that wisely and prudently constructed framework — the Constitution of the United States.

In conclusion, let us impress upon the mind of the reader the fact that the danger of invading the rights of the States and of depriving them of the power of dealing, in such manner as to the voters shall seem fit, with a troublesome question in the nature of a proposed sumptuary law, is not an imag-

inary danger. Consider long and carefully what it signifies to establish a precedent of this character. South Carolina under her constitution permits no divorce. Reformers may insist that a uniform national divorce law is imperatively needed. Will the people of South Carolina agree that it is perfectly right for her sister States to tell her that she does not know how to deal with this subject?

A state of affairs still more serious may be discerned as within the verge of possibility. The Supreme Court of the United States has recently upheld a right in the Congress to impose a surtax on incomes. Let us suppose that the financial burden of the war becomes almost intolerable. (We have not thought the loss of revenue from the tax on liquors a circumstance worthy of mention, but the opponents of the resolution cite the fact that the Secretary of the Treasury estimates the receipts from taxes of this nature for the year ending June 30, 1918, as amounting to \$465,000,000.) In this situation every conceivable plan is suggested for raising revenue. A member of Congress of a progressive turn of mind hits upon an expedient. He would have a huge tax levied upon the several States of the Union, assessed according to the wealth of each. Upon the five wealthiest States a surtax to be fixed by Congress shall be imposed. In order to do away with the uniformity clause of the Constitution, an amendment shall be drawn up. The less wealthy States, we will imagine, might not be free from a temptation to favor this ingenious scheme. We need not go further into details.

To repeat then, we are reasonably certain that every member of the National Association for Constitutional Government will feel it to be his duty to inform himself fully as to the subject-matter, and do something by way of protecting the Constitution against this ill-advised movement. If he desire to present his neighbor with a brief summary of reasons for opposing ratification, he can hardly do better than to read to him the following extract from the Congressional Record of December 17, 1917. He might add that it presents one of the best speeches

that has ever been delivered on the floor of Congress:

The Speaker pro tempore: "The gentleman from Connecticut is recognized for one minute."

Mr. Tilson: "Mr. Speaker, it will not require one minute for me to state my position. In my judgment, this is not the time, the place, or manner in which to bring about either prohibition or woman suffrage. Both should be accomplished, if at all, by means of the ballot at the polls within the several States, and at a time when the country is not in the midst of a great war."

The Law and the People¹

By George Sutherland

Former United States Senator from Utah

In these days of false teaching and popular unrest, I can imagine no subject more timely or vitally important than that of "the law and the people." If orderly government is to endure, the faith of the people in the integrity of the courts and the independence of the courts themselves at all hazards must be preserved. There is abroad in the land a sentiment that the judges, in passing upon constitutional questions, are exercising a power which does not belong to them and that it devolves upon the people themselves to undertake the essentially dispassionate and deliberative task of reviewing and affirming or overruling judicial decisions. There is much—indeed, there is very much—that calls for reform in our methods of

judicial procedure. There is room no doubt for improvement in many places upon the bench, as there is room for improvement everywhere else, even among the sovereign people themselves, who are as a whole always honest and sincere, but, as represented by the voice of the majority, frequently unwise and in the long sweep of history sometimes unjust. The frenzied story of the crusades, the black records of witchcraft and slavery, to say nothing of the many minor and less harmful mistakes and delusions of the past, bear melancholy witness to the fact that the earnestness and universality of an opinion is by no means a conclusive test of its truth or justice. Truth has been so often developed and error so often exposed by the

¹ From an address before the Pennsylvania Society of New York, December 13, 1913, reprinted by permission of the author.

patient study and sturdy insistence of the few as compared with the many, that we may well hesitate to adopt any plan which, in the settlement of judicial questions, undertakes to substitute the superficial methods of the hustings for the patient and thoroughgoing processes of the bench.

I am sufficiently old-fashioned to believe that we are seldom justified in getting rid of old methods or old institutions until and unless we are reasonably sure of our ability to put better methods or better institutions in their places. Perhaps I may as well plead guilty to being a little bit conservative, a grave offense in these strenuous days. And let me pause long enough to say that "conservatism" is not a political policy. It is a habit of thought which induces the individual who has it to propound certain disturbing and exasperating inquiries respecting terminal facilities before he journeys forth to unfamiliar places, and to regard a vivid imagination as a somewhat indifferent substitute for a map.

The democracies which preceded the American Revolution failed because the people undertook the impossible task of conducting the government by their own direct action, or because they gave to their officials the outward semblance of authority and withheld its substance by hanging above their heads the perpetual menace of the recall. Men of courage and of pronounced and independent views—precisely those best qualified to serve—were driven from office, and the time-server, the sycophant, and the demagogue took their places. Naturally a society so consti-

tuted went down before the grave problems which arose in time of stress and trial, not because the body of the people was unsound, but because the organs of their government were weak from lack of responsible exercise. To insist that the people *en masse* can by direct action successfully make laws, execute laws, and interpret laws, is to leave the solid ground of practical common sense for the unsubstantial realms of fancy; and in this country of extensive area, great population, vast undertakings, and complex problems, is as wild a dream as anyone can indulge, unless it be to imagine that an individual can breathe or think or see without organs appropriate for those functions. This the framers of the Constitution perfectly understood, and instead of providing for an unlimited democracy, they gave us a representative republic, in which they established the legislative, executive, and judicial departments as the responsible organs for making, executing, and interpreting law, and it is this organic structure that marks the difference between government and anarchy. In all the avenues of *industrial* activity, as duties multiply and increase in difficulty, a division of labor comes to be more and more accepted as an obvious necessity; but the last decade of our history has witnessed the rise of a new school of politicians, whose philosophy seems to be based upon the somewhat dubious doctrine that the difficulty of solving *governmental* problems decreases in the inverse order with which their number and complexity increase. None of these amiable reformers apparently contends that each member of society can make his own shoes, teach

school, compose music, construct intricate machinery, heal the sick, or design or build the superb edifices which adorn the streets of our great cities, but all of them—perfectly honest, patriotic, sincere, but slightly unstable pillars of the republic—have succeeded in convincing themselves that anybody is sufficiently informed to make perfect laws and everybody wise enough accurately to interpret them in their application to the diverse and complicated questions that from time to time tax to the utmost the wisdom and industry of the courts.

Specialization, concededly so necessary in every other domain of human endeavor, when we come to the field of government, in many respects the most difficult of all, is regarded as quite superfluous. Having evolved a complete and efficient governmental system under which we have proceeded, at least in safety, for a century and a quarter, it is now proposed, in response to an artificially induced, hysterical sentiment, to put in the place of the organic processes of government the disorganized operations of the multitude under the alluring title of "direct government by the people," and finally, so far at least as constitutional interpretation is concerned, to substitute for the orderly, trained and responsible judgment of the courts the irresponsible and to a large extent uninstructed impressions of the numerical majority.

The past has disclosed many mistakes which we would do well to avoid, but a thing is not necessarily bad simply because our fathers believed in it. I have an abiding faith in the inherent soundness and the enduring

wisdom of the underlying principles upon which these American representative institutions of ours were established by our fathers a hundred and twenty-five years ago. I do not for one moment doubt their capacity for progressive development to meet the constantly changing needs of our economic, industrial, social, and political growth, but I have no patience whatsoever with the apparently growing tendency to glorify everything that appears to be on the way and to damn everything that is already here. Surely out of the infinitely varied experiences of mankind—the long, long wanderings through the night of barbarism, the slow deliverance from the shackles of feudalism, the passionate struggles against arbitrary power, the stern destruction of despotic governments, the bloody restoration of order out of confusion, the pathetic alternation of success and failure in the efforts at self-government—some lessons of final wisdom have been learned, some monuments of deathless truth have been lifted up against which no challenge of time or circumstance can ever again prevail. If from all the painful struggles of the past, where so much that was temporary has been lost, nothing of permanence has been gained; if from all the strivings for order without oppression and justice without discrimination no fixed and immutable principles have been established, then indeed are we vain pursuers of shadows which come and go in endless and unmeaning procession. But humanity has been engaged in no such futile and barren enterprises. Some things have become finalities. From it all there

has emerged at least this one basic principle, without which popular government is builded not upon the rock which endures but upon the dissolving quicksands into which all the democracies of antiquity have disappeared: That liberty to be secure must rest upon a foundation of pre-established law, administered by upright, impartial, and independent judges, to the end that there shall be a government of laws and not of men.

The demand for the recall of judges is based upon a complete misconception of the nature of the relationship which subsists between the people and the judge, who is not a political agent to declare the *wishes* of a constituency, but a self-responsible arbitrator to decide the *rights* of contending parties, bound by the most solemn of covenants to consider nothing but the law and the facts and to obey no voice save the compelling voice of his own instructed conscience. The demand for the recall of judicial decisions proceeds upon a theory which completely disregards the nature of the judicial function, which is not to register the changing opinions of the majority as to what the Constitution and law ought to be, but to interpret and declare the Constitution and law as they are, whether such interpretation satisfies the desires of many or of none at all.

The claim that the courts have usurped the power which they exercise, whenever the question arises in a case properly before them, of deciding a legislative act to be unconstitutional, will not stand before a moment's intelligent consideration. The Constitution

was made by the people themselves. In it they have expressly defined the limits of the legislative power. They have declared in unmistakable terms that "this Constitution shall be the supreme law of the land." The entire judicial power is vested in the courts, and this extends to all cases arising under the Constitution and laws of the United States. The courts are therefore bound to determine in any controversy properly before them what are the facts and what is the law, for it is that determination which constitutes the exercise of judicial power. Obviously, an act of legislation which contravenes a provision of the Constitution is not law at all, for if it were, the Constitution to that extent would cease to be supreme. The court, therefore, in holding such a legislative act to be unconstitutional, exercises an authority conferred by the people themselves, and simply declares that the supreme law of the land made by all the people is superior to the conflicting enactment of a mere agent of the people. If anyone will take the trouble to investigate the facts instead of accepting the statements of some would-be reformer, who either does not know or does not care what the facts are, he will be surprised to find how comparatively infrequent are decisions holding legislation to be unconstitutional, and then if he will analyze these few cases he will again be astonished to find how large a proportion of them meets with his own approval and that of everybody else. The whole assault upon the courts has raged about some half dozen cases which bear to the whole body of constitutional decisions

a relative proportion so small as to be utterly insignificant. But because there is dissatisfaction with these few decisions the demand has gone forth that the people shall resolve themselves into a great and tumultuous court of appeals, to recall judicial decisions and thereby engraft upon the Constitution an exception or an extension or a restriction or an interpretation, not upon a sober, dispassionate, deliberate consideration of its general and prospective application, but upon a partial and more or less excited view of some special and exceptional result which has already happened. The effect of the plebiscite will not be to enact a rule for future guidance, binding the majority as well as the minority, but will be simply to give passing expression to the fleeting opinion of the temporary majority, having no binding force upon the less instructed or the more instructed majority of another day. Like idle words written upon the sands the construction of today will disappear tomorrow, only to reappear at a later day, as the sentiment of the majority ebbs and flows.

The conscious struggle of the Anglo-Saxon race has been not so much to establish a government, which the very nature of man would have established almost without self conscious effort, as it has been to establish a government of laws as distinguished from a government of men. Of the vast number who have spouted this tremendous phrase, I wonder how many have realized the deep significance of these four words, "a government of laws," the very crux of which is that the rights of every man shall be held and determined un-

der general standing law, administered by impartial tribunals, and not under the special edicts of other men, however numerous or wise or powerful they may be. Law is a prescription for future behavior; judgment is a certificate of past conduct. To make law is an act of the will; to interpret law is an effort of the reason; and any system under which the meaning of law is made dependent on will is an unjust and an arbitrary and a despotic system, whether the will be that of monarch or of multitude, for injustice is an evil which does not depend for its quality upon the machinery by which it is inflicted. Many attempts have been made to define justice, but for all the practical purposes of society it must at last come to this—that justice is simply exact conformity to pre-existing and obligatory law. The personification of justice which has come down to us from the days of antiquity is an austere figure with bandaged eyes holding aloft a pair of scales, embodying the conception of a power which weighs the cause without seeing the parties. I am not sure that I quite approve the bandage, for I like to think of justice as not blind, but clear-eyed, keen of vision, seeing all things, persons as well as causes, shrewdly approximating them at their true worth, beholding them in their just proportions, taking their measure as well as their weight, consciously and intelligently rejecting all extraneous material and considering only that which bears upon the merits of the cause. But the idea sought to be conveyed is that the court must ignore all differences of rank or station or number or power, for at the bar of

justice all such distinctions are merged by the universal solvent of equality, and every cause must stand by its own strength in the presence of the judge.

The guaranties of the Constitution are primarily for the protection of the minority. The majority can take care of itself. But if the majority assume the judicial power of interpretation, the rights of the minority are no longer guaranteed by the definite terms of the constitutional compact, but are subject to the will of the majority, for it is obvious that a vote is more likely to reflect the wishes of the voter than his judgment, since a judgment, unlike a desire, involves patient investigation, in which few will have time to engage, and dispassionate application of general rules to particular circumstances, which many will be in no frame of mind to make.

I believe in popular government as earnestly as anyone. The notion of a ruling class is abhorrent to every just principle of liberty and equality, because so long as man is selfish, the few, though never so wise, cannot safely be intrusted with unlimited power over the many, and because it is intolerable that any man should rule over his fellows without their consent. Persistent and substantial majorities, acting within the scope of their legitimate functions, are generally right, and even temporary and narrow majorities must for all practical purposes of political society be assumed to be right, else we should have anarchy instead of government. But the difference between 90 men and 100 men is not so great as to confer infallibility upon

the preponderant number. Indeed, the opinions of a few men of high character and attainments, intelligently selected from almost any community, will ordinarily be a far safer guide to follow than the opinions of many men chosen at random; and I cannot avoid the reflection that it might have proven of distinct advantage to the republic if some just and feasible method could have been devised whereby, when intellectual problems were to be solved at the polls, voters could have been measured instead of counted.

Judges are selected for their learning, ability, and impartiality, but if they are to be made subject to reversal by the vote of a majority, such men will inevitably disappear from the bench and politicians will take their places who will very naturally endeavor to ascertain the drift of popular sentiment before deciding, and decisions instead of reflecting the intelligent and independent judgment of the judge will voice the speculations of the politician as to what the opinion of the majority is likely to be. The experience of mankind has demonstrated that when legislative power and judicial power are placed in the same hands, inequality in the operation and application of the law invariably results. Under the guise of construing the law, in order to relieve special cases of real or imaginary hardship, the law is in fact altered so as to remove consequences which attached or impose consequences which did not attach under the law as it is plainly written. If the Supreme Ruler of the Universe, whenever some special hardship were threatened as the

result of the uniform operation of His laws, were to create an exception to meet the special contingency, we should have, instead of a universe of dependable order and sequence, a chaos of erratic and unforeseeable chance. And so it is that "the rain falls upon the just and the unjust alike," with the somewhat doleful consequence that the most virtuous of progressives acquires dampness and rheumatism in common with the most unregenerate of reactionaries, a result wholly out of harmony with modern notions of social justice.

In making law consequences are very properly considered. In construing law the judge has nothing to do with consequences; he must enforce the law as he finds it. If, then, the people who make the Constitution also expound it, thus combining in themselves both the power of legislators and judges, the vital distinction between the two functions will soon be lost sight of, and alterations of the most profound character will be made in the fundamental law, not by an amendment which deals with the matter prospectively, generally, impersonally, but by a temporary act of interpretation made expressly to avoid some specific undesired result. This interpretation, having been made today, will be unmade tomorrow, and the Constitution will cease to be a foundation of fixed and dependable stability and become a weathercock, shifting with every breath of popular emotion. The time will probably never come when anyone will say that the wisest judge can make shoes with the skill of a shoemaker, but the day seems not

far off when many will passionately insist that any cobbler who waxes a thread is the peer of any judge when it comes to the simple problem of deciding constitutional law. But I look forward to the future in hope and confidence nevertheless, for after all, common sense is still among the happy possessions of our people, and I am sure will in the end interpose its protecting shield between the courts and the monumental folly of the recall. This magnificent judicial establishment of ours, with its hundreds of great courts, its learned and upright judges, its splendid and inspiring traditions, its noble jurisprudence, is not here as the chance windrow of some vagrant passing breeze, to be again dissipated and destroyed by the vagrant passing breath of the dreamer or the demagogue. It is here as the culmination of more than a hundred years of patient, constructive, conservative effort on the part of wise and patriotic men who have striven to uprear a temple within whose sanctuary *justice*, and not *power*, shall measure the rights of men. Here and there some judge has been wanting in ability; now and then, more rarely, some judge has been corrupt; but the great judicial establishment itself stands today and will continue to stand, please God, long after its assailants have passed into nameless and forgotten dust, having neither the sword nor the purse nor any power save the power of its own righteousness, but compelling justice between the rich and poor, the powerful and the weak, the multitude and the man, stainless as virtue and incorruptible as the everlasting truth.

The Invention of Constitutional Conventions

By Roger Sherman Hoar

Constitutional conventions are now such a common affair that the people of Massachusetts are today viewing with perfect equanimity the presence of one in their midst. Yet a century and a half ago such conventions were entirely unknown to the world. Historians are gradually narrowing the search to determine who first originated the idea. The invention is usually credited to a mass meeting held in Hanover, N. H., in June, 1777, just as the invention of the telegraph is usually credited to Morse, and the opening of the Revolutionary War is usually credited to the town of Lexington; whereas all three ought really to be ascribed to Concord, Mass. The true facts with regard to the telegraph and the fight at the North Bridge are generally known to historians, but it has only just been discovered that Concord invented the constitutional convention as well.

Walter Fairleigh Dodd, writing in 1910, as a result of his researches at Johns Hopkins University, pointed out that although many of the early constitutions of the American States were framed by bodies calling themselves conventions, yet these bodies were in some instances legislatures attempting to frame constitutions, and in others, conventions exercising legislative powers. In other words, they not only framed constitutions, but also, with two exceptions, served as the regular governing bodies of their respective States. The same may be said of the various European precedents, notably

those of the French Revolution, and the two in England during the seventeenth century. Earlier conventions, such as the one that framed Magna Charta at Runnymede in 1215, were not representative bodies.

Reverting to the conventions of the American Revolution, we find that only two States, namely, New Hampshire in 1778, and 1781-83, and Massachusetts in 1779-80, held constitutional conventions within the modern meaning of the term, that is, representative bodies called for the sole purpose of framing fundamental law. Dodd gives to the towns of the New Hampshire grants, meeting in Hanover in June, 1777, the credit of originating the convention idea; but to the town of Concord, Mass., belongs the honor of antedating the towns of the New Hampshire grants. It happened in this way. The Massachusetts legislature of 1776, being desirous to frame a constitution for the State, sought the permission of the various constituent towns. Many of these objected on the ground that no constitution was needed, and a few because they mistrusted the personnel of the then legislature. But Concord was the first town to lay down the principle that, although a constitution was needed, the legislature was not the proper body to frame it. The Concord protest appears as document 182 in book 156 of the archives at the State House. This document represents the vote of a town meeting held October 21, 1776, and thus antedates the Hanover meeting by about eight months.

Turning to the original minutes of the Concord meeting, which are still preserved in the vaults of the old Town Hall on Liberty Square in Concord, we find that at a meeting held October 1, 1776, to consider the proposal of the legislature, the town appointed a committee of five to draw up a reply. These five were Ephraim Wood, Col. James Barrett, James Barrett, Esq., Col. John Buttrick, and Nathan Bond. Which of them originated this fundamental idea, which has developed to such importance in this country, will probably never be known. They were all interesting and prominent characters, any one of whom would have been capable of its authorship.

The chairman, Ephraim Wood, was a shoemaker by profession. He was born in 1733. He was tall and erect, weighed 250 pounds and had a 24-inch calf. In 1771 he was chosen chairman of the selectmen, town clerk, assessor, and overseer of the poor, and was subsequently re-elected to all these offices seventeen times. He frequently served as moderator of the town meeting. In 1785 he was appointed associate judge of common pleas, and in 1797 to be judge of that court, which position he held until the court was abolished in 1811. In 1773 he was a member of the committee which drew up the protest on the tax on tea. He was a member of every committee of correspondence from 1776 to 1783, and in 1776 was chairman of the county committee of these committees. In 1779, when his convention idea had borne fruit, he represented Concord in the convention which wrote our present constitution. He married the widow

of James Barrett, Esq., one of his associates on the committee which we are discussing. In 1814 he died as a result of a peculiar accident. One of his cows kicked him, paralysis of the throat set in, and he died of starvation.

Col. James Barrett was the oldest member of the committee, being 66. He was doubtless chosen because of the fact that he was then the town's representative in the legislature, having served since 1768, and serving until 1777. He was also a delegate to many of the State and county conventions of the period. When the Minute Men were organized in March, 1775, he had been chosen a colonel and so was in supreme command at the battle of Concord on April 19. On that day, in his capacity as superintendent of the military stores of the colony (Concord being then the capital of the Revolutionary forces), he had been very busy concealing these stores, and so escaped arrest as a traitor by a posse of British soldiers which was sent to his house. He gave the command which sent the colonial troops down to the fight at the bridge, but his subordinate, Maj. Buttrick, actually led the troops and ordered the firing of "the shot heard 'round the world." Col. Barrett died in 1779. Col. Barrett's oldest son, James Barrett, Esq., also a member of the committee, was born in 1734. Like his father, he was a farmer. He was also justice of the peace. It is reported that he was so small at birth that his mother placed him entirely within a quart tankard, yet he grew to be over 6 feet in height and was strong and broad shouldered. He served on all the committees of correspondence

from 1776 to 1783, and on the county committee in 1776, and was several times elected representative in the legislature. He died in 1799, and his widow married his colleague Wood.

Col. John Buttrick of the committee was born in 1731. He also was a farmer. His farm overlooked the battlefield to which he led his troops on April 19, 1775. It was he who, as major in command at the North Bridge on that day, jumped with both feet off the ground and uttered the historic words: "Fire, fellow soldiers; for God's sake, fire!" which resulted in the shot heard 'round the world. He was a member of all the annual committees of correspondence, except the first in 1776 and the last in 1783. He died in 1791. Of Nathan Bond, the fifth member of the committee, not so much is known. He was born in 1752, making him 24 and thus the youngest member of the committee. He was the only college man on it, being a graduate of Harvard, class of 1772. After the war he moved to Boston and took up the business of a merchant, dying there in 1816. No one has yet discovered just which of these interesting characters invented the constitutional convention. The meeting of October 1, 1776, at which they were appointed, adjourned to October 21, at which date they made their report to "a very full town meeting," which adopted it unanimously. The record of this meeting, in the handwriting of Ephraim Wood, reads as follows:

"At a meeting of the Inhabitants of the Town of Concord being free and Twentyone years of age and upward,

upon adjournment on the twentyfirst Day of October, 1776, Ephraim Wood Junr being Moderator, Voted unanimously that the Present House of Representatives is not a proper Body to form a Constitution for this State. And Voted to Chuse a Committee of five men to make answer to the Question Proposed by the House of Representatives of this State and to Give the Reasons why the Town thinks them not a suitable body for that Purpas, the persons following was Chosen the Committee above mentioned, viz, Ephraim Wood Junr, Mr. Nathan Bond, Col. James Barrett, Col. John Buttrick, and James Barrett esqr. And the Committe Reported the following Draft which being Read several times over for Consideration it then was Read Resolve by Resolve and accepted unanimously in a very full Town meeting—the Reasones are as followes—

"Resolved 1st, that this State being at Present destitute of a properly established form of Government, it is absolutely necessary that one should be immediately formed and established.

"Resolved secondly that the supreme Legislative, Either in their proper capacity or in Joint Committee are by no means a Body Proper to form & Establish a Constitution or form of Government for Reasones following, viz— first Because we conceive that Constitution in its proper Idea intends a system of principals established to secure the subject in the Possession of and enjoyment of their Rights & Privileges against any encroachment of the Governing Part. Secondly Because the same Body that forms a Constitution have of Consequence a power to alter

it—thirdly Because a Constitution alterable by the Supreme Legislative is no security at all to the subject against the encroachment of the Governing part on any or on all their Rights and Privileges.

“Resolved thirdly that it appears to this Town highly expedient that a Convention or Congress be immediately chosen to form and establish a Constitution, by the Inhabitants of the Respective Towns in this State being free and Twentyone years and upward, in Proportion as the Representatives of this State were formerly chosen; the Convention or Congress not to consist of a greater number than the house of assembly of this State heretofore might consist of, except that Each Town & District shall have Liberty to send one Representative; or otherwise as shall appear meet to the Inhabitants of this State in General.

“Resolved 4ly. That when the Convention or Congress have formed a Constitution, they adjourn for a short time, and publish their Proposed Constitution for the Inspection and Remarks of the Inhabitants of this State.

“Resolved 5ly. That the Honble. House of assembly of this State be De-

sired to recommend it to the Inhabitants of this State to Proceed to Chuse a Convention or Congress for the Purpas above mentioned as soon as possible. Signed by order of the Committee Ephraim Wood Ju Chairman, and the meeting was Desolved by the Moderator.”

The resolution itself, also in Wood's handwriting, is the historic document which shaped the views of Massachusetts and New Hampshire, so that these two States gave to the world the constitutional convention as we know it today. It is immaterial that the legislature disregarded this advice of the town of Concord and submitted a constitution in 1778; for the Concord idea spread, and the people rejected this constitution largely because it was framed in violation of the fundamental principles enunciated by Concord. Concord itself cast one hundred and eleven votes against it and none in its favor. In 1779, the Concord idea bore fruit, and our present constitution was drafted by a convention called and held in the manner first suggested by Ephraim Wood and his associates. (Reprinted, by permission, from the *Boston Evening Transcript* of July 3, 1917.)

Confusing the Landmarks

In advocating the rejection by the States of the proposed prohibition amendment to the Federal Constitution, *THE CONSTITUTIONAL REVIEW* has nothing whatever to say on the moral aspects of the question involved or the effectiveness of prohibitory legislation. It is not to be classed as either "wet" or "dry." There may be many of its readers who are opposed on principle to prohibitory and all other sumptuary laws. Very well, the *REVIEW* holds no brief for them. Probably also there are many who, equally from conviction, are in favor of national prohibition. We have no quarrel with them; but the *REVIEW* is not their champion either. It refuses to take sides. It is not at all concerned about the activities of the Anti-Saloon League on the one hand or of the Brewers' Association on the other hand. But there is one thing about which it is concerned, and very deeply concerned, too. And that is the fact that the Constitution of the United States is threatened with a grave danger. It is the same danger which threatened the State constitutions and finally overcame some of them, which robbed them of the respect of the people and rendered them little better than ridiculous, and so worked havoc with the State governments. It is the danger of permitting a constitution (which is a declaration of fundamental principles of government) to be converted into a congeries of laws, which embody matters of policy and expedience.

The provisions of a constitution refer to the basic principles of govern-

ment and the establishment and guaranty of liberties. A statute is designed merely to regulate the conduct of individuals among themselves. A constitution embodies the chief articles of a people's belief as to the immutable foundations of just government and defines the organs by which they mean it to be executed. Statutory legislation finds its proper field in the shifting and changing conditions of the hour. A constitution, therefore, should be rigid, a statute plastic. And the moment you begin to confuse the landmarks, to degrade the constitution from its high place, to overload it with matters of mere policy or social experimentation, you weaken its vigor, put it in peril of popular contempt, and inculcate the notion that it can and should be changed and changed about, to suit the passing whim, as easily as the resolutions of an ordinary legislative body or a town council. And that way lies ruin. For let it not be thought that the prohibition amendment, if adopted, will be the only piece of statutory law to be engrafted upon the Constitution. On the contrary, once set the precedent—show how easy it is to write propaganda into the fundamental and enduring law—and we shall soon have amendments to prohibit every vice that disfigures the social organism and to promote every plan of every reformer who aspires to regenerate humanity by force of law.

We agree heartily with what is said on this point by Mr. Fabian Franklin, writing in the *North American Review* for February, 1918: "Apart from all

questions of self-government for the States, and all questions of personal liberty for the individual, the insertion of the prohibition amendment into the Constitution of the United States would constitute a deplorable degradation of its character. The Constitution is not perfect; it has been amended to its advantage, and will need to be amended in the future. But there is a noble simplicity about it which is an incalculable factor in its strength. It does not undertake to lay down prescriptions about the multifarious matters which belong to the domain of ordinary legislation. Its injunctions, whether positive or negative, relate to fundamentals, and are the embodiment of broad and deep political convictions. To introduce into it the decision of a special question like that of the control of drink, however strong the wave of public feeling that may seem to be behind that decision, is to lower the level and weaken the authority of the whole instrument."

Of course, there are other and strong arguments against the adoption of this amendment. One is that it would work an entire change in the relations between the Federal and State governments, since it would destroy the balance of authority between them, involve the surrender by the States of their right to regulate their own internal concerns, and in fact strike at the very root of that principle of local self-government which has been one of the most cherished possessions of all free peoples for several centuries. This is not an abstract question of political science. It is a matter of immediate

and vital concern. Every man who uses his brain must see that any attempt to take from the people of the States the right to regulate their own personal and local concerns (unless it be absolutely necessary for the general welfare), any endeavor to standardize life and morals, without taking into careful account the immense differences, geographical, racial, industrial, and temperamental, between the different parts of the United States, to say nothing of the possessions beyond the seas, must be fraught with grave danger. But this argument has been so conclusively developed by ex-President Taft in his article in the REVIEW for July, 1917, pages 76-78, and by Mr. Hackett in this number, that we need not enlarge upon it.

Most people would agree that any unnecessary meddling with the fundamental law of the land is ill-advised if not dangerous. And the prohibition amendment is precisely that—an unnecessary meddling with the Constitution. If the several states are incompetent to deal with the liquor problem, if it must be dealt with as a national problem, Congress already has the power to solve it. This is demonstrated by Prof. Long in his article in the REVIEW for January, 1918, at page 12, where it is said: "Even if it be desired to control the matter by a national law, Congress already has power to enact the necessary legislation. Through its control of interstate commerce and the postal service, and by the exercise of the taxing power if necessary, Congress can put an end to the liquor traffic just as it has sup-

pressed lotteries and oleomargarine disguised as butter, and regulated the trade in foods and drugs. The prohibition of the transportation of liquor in interstate commerce or by mail, and the refusal to carry liquor advertisements or orders or newspapers containing such advertisements in the mails, and also the imposition of a prohibitive tax on the manufacture and sale of liquor, would soon put an end to the business." If there are certain States which now have their own prohibitory laws (backed by a sincere and preponderant public opinion), and if it is believed that those laws cannot be made perfectly effective without Federal restraint exercised upon the people of certain other States, that assistance may be sought and obtained from Congress, without mutilating the fair structure of the Constitution. But that is not the animus which lies back of the proposed amendment. Quite frankly, it is the desire of certain individual citizens, organized in purely voluntary groups, to make use of the one irresistible force (the Constitution of the United States) to impose their system of dealing with the liquor traffic upon the people of certain States which have always hitherto refused to adopt it, precisely because it has not been and would not be supported by a sincere and preponderant public opinion. This is clearly perceived; and already it has begun to bring about the natural result, mutterings of an ugly and bitter sectional feeling, regional recriminations, a dangerous abrasion of old sores. The outcome, as remarked by a New York newspaper, "is to weaken the whole national fabric, and to work

toward the disintegration of a Union which was cemented by the Spanish-American war, and which will be made still more solid, if unwise measures do not prevail, by the unity of national defense against the military autocracy that has been threatening in Europe. Tinkering with the Constitution is a delicate business at any time. In wartime it has all the mischief of starting a backfire. One Russia at present is enough."

But if prohibition is to be enforced by Federal law, what is the difference between enforcing it by congressional enactment and enforcing it by constitutional amendment? The answer is that the former method would admit of revision, amendment, or even of eventual repeal if that should be deemed wise or necessary; the latter not. For, if prohibition is once written into the Constitution, it will never come out again. None of the seventeen amendments has ever been repealed; none ever will be. So we are to yield to the impulse of a wave of moral emotionalism, and, discarding other sane and perfectly adequate measures, we are to impose certain prohibitions as to personal habits and behavior upon all the unborn generations of American citizens down to the death-day of the nation. Is that what we want?

It is not even certain that the amendment was legally submitted to the States. The fifth article of the Constitution provides that Congress may propose amendments "whenever two-thirds of both houses shall deem it necessary." According to the natural import of the words, "two-thirds" of

a house of Congress means two-thirds of the members of that house. A practice has grown up of considering two-thirds of those present and voting as sufficient, but there are many students of constitutional law who think this practice indefensible and a violation of the meaning of the Constitution. The joint resolution proposing this amendment received 282 affirmative votes in the House of Representatives. That number constituted a two-thirds majority of those voting on the question, but not a two-thirds majority of the members of the House. In the Senate, the resolution was passed by 65 votes to 20, a majority which satisfied the requirement of the Constitution. But a second vote in the Senate was necessary because the resolution had been amended in the House. The vote by which this amendment was accepted or concurred in was 47 to 8. In other words, all those voting in the Senate the second time, both affirmative and negative, did not make up a two-thirds majority of the Senate.

Nor is this all. The joint resolution declares that the proposed amendment shall not become a part of the Constitution unless ratified by the requisite majority of the States within seven years after its submission. This limitation is clearly unconstitutional and may vitiate the whole process of submission, although Senator Borah seems to have been the only member of either house who saw the fault and called attention to it. The argument is extremely simple; it requires no previous training in constitutional law to follow it. The fifth article of the Constitution provides that it may be amended. But it

may be amended only on compliance with certain conditions. These conditions are specified. The first is that two-thirds of both houses of Congress shall deem it necessary either to propose amendments or to call a convention for that purpose. The second condition is that the proposed amendment shall be ratified by the legislatures of three-fourths of the States or by conventions in three-fourths of the States. The other conditions (as to prohibiting the importation of slaves and as to depriving a State of its equal suffrage in the Senate) do not affect the matter in hand. There are no other conditions. Therefore, the Constitution intends that no other conditions shall be imposed. But Congress, in the joint resolution in question, has attempted to impose another condition, namely, that the amendment shall be ratified within seven years. In other words, Congress has attempted to amend the amending clause of the Constitution. It has no power to do so.

What are we to think of the second section of the proposed amendment, which provides that "the Congress and the several States shall have concurrent power to enforce this article by appropriate legislation"? That it is absurd, impracticable, directly contrary to the spirit of the Constitution and to its whole purpose as conceived by the founders of the Republic, and likely to result in far-reaching and disastrous consequences. The *New York Times* has well said: "What is concurrent legislation? The Federal powers and the State powers are exclusive, barring the twilight zone. On a sub-

ject on which a State has the power to legislate until Congress legislates, the State law, when Congress does legislate, is either overridden or is valid only in so far as it is not inconsistent with the Federal law. The most fantastic dreams of constitution-tinkerers never imagined any Witches' Night of innovation like this. The United States abdicates sovereignty. It sets up forty-nine co-equal powers, forty-nine concurrent (or dissenting) confederate authorities to enforce an amendment for whose existence the dregs on the House Judiciary Committee may have thought that Congress might show no intemperate zeal. The interstate, the State-Federal bickerings and collisions, the clash of courts, the inequalities and injustices which this curious scheme implies and involves, are obvious. Not for its inevitable sequela, but for its essential folly is it most to be reprehended. So far as it goes, and for the august necessities of prohibition, it denationalizes the nation. It deposes the United States and scatters the supremacy of its government." Yet it is exactly to the sequela of this innovation that attention ought to be directed. The *New York Sun*, quoting Senator Cummins as saying that the section mentioned is "superfluous and redundant," and denouncing what it not inaptly describes as "the camouflage in the prohibition amendment," observes: "The most important question, it appears to us, is not what the introduction of the superfluous and redundant language may do for the cause of prohibition, but what it may do to the Constitution and to our system of institutions. This superfluous and re-

dundant clause is not going to disappear from the Constitution as soon as it has accomplished its dishonest purpose and the prohibition amendment is ratified. Concurrent power of the Congress and of the State legislatures to legislate is going to remain in the Constitution as a declared principle and as a precedent to invite and facilitate further experiments in revolutionizing our form of government, and to muddle—to what extent of confusion and disaster we can only conjecture—the perfectly clear and proper distinction between Federal power and State power in legislation. We can conceive no more dangerous source of future trouble than will be supplied by the deliberate introduction into the text of the Constitution of this fraudulent and absurd clause."

The legislatures of nine States have already given formal ratification to the proposed amendment, Mississippi, Virginia, Kentucky, South Carolina, North Dakota, Montana, Texas, Delaware, and South Dakota, in the order named, and the legislature of Maryland has virtually, though not formally, taken the same action.

The Constitution of Tennessee (Art. 2, sec. 32) and the Constitution of Florida (Art. 16, sec. 19) contain the following provision: "No convention or legislature of this State shall act upon any amendment of the Constitution of the United States, proposed by Congress to the several States, unless such convention or legislature shall have been elected after such amendment is submitted." The object is, of course, to obtain for the legislature

which is to vote on the amendment a direct mandate from the people. In the absence of a similar provision in the constitutions of the other States, there is a very notable and widespread demand for such postponement of legislative action on the prohibition amendment as will give the people of any given State an opportunity to voice their preference, either by a referendum vote or by the election of a legislature with this special issue in view. In the Maryland legislature, a motion to postpone the vote on the amendment for two years, for this purpose was offered, but was defeated by a vote of 55 to 45. Senator Calder of New York is understood to favor the submission of the prohibition question in the form of a referendum at the next general election in that State, the legislature awaiting its result. Governor Holcomb of Connecticut refused to call a special session to act on the amendment, expressing the opinion that such action should be taken only by a legislature elected with the knowledge that the question is to be voted on. Similar views are expressed by many influential newspapers, undoubtedly reflecting a strong current of public opinion. The *Springfield Republican* remarks that "if each State in passing upon an amendment to the Federal Constitution could be required to follow the verdict pronounced by a majority of the voters in a popular referendum on the subject, the adherence to the principles of democratic government would be beyond criticism." The *Hartford Post* thinks "it would be monstrously unfair to force a decision on the ques-

tion at this time. The question of prohibition or non-prohibition is important enough so that the people should have a voice in deciding it." Other papers hold the view that while legislatures now in office undoubtedly have the legal right to commit the states to ratification or rejection of the amendment, they have no moral right to do so, the members having been elected without any expectation on the part of their constituents that such a question would be presented. In several States there is good ground to believe that a vote of the existing legislature would be directly contrary to the wish of the general public. And even more than this, as a New Orleans paper points out, "a legislature might ratify the amendment in opposition to the expressed verdict of the people of its State. Thus the present General Assembly of Louisiana will be competent to pass on the amendment, and it might act favorably, despite the fact that State-wide prohibition was a dominant issue when the legislature was elected and was overwhelmingly voted down." So again, we read in the *Jacksonville Times-Union*: "The question was submitted in Florida and Alabama, and prohibition was defeated, but the legislature of Alabama enacted it despite the vote of the people and the legislature of Florida enacted a measure approaching as nearly to prohibition as the constitution of the State would permit."

Wider grounds for desiring an expression of public opinion before irrevocable action is taken are stated by the press, as, for instance, by the *Dallas News* in the following editorial re-

marks: "Ratification or rejection of an amendment to the Constitution of the United States is a matter of such great importance and solemnity that the representatives of the people ought not to take such action until the people have expressed their will or at least have had an opportunity to do so. No State constitution can be amended except by a vote of the people. Logically, therefore, no State ought to be committed as to an amendment of the Federal Constitution without the consent of its people. Indeed, the reason as concerns the Federal Constitution is stronger than that relating to a State constitution. If a State shall err in making or revising its own constitution, it nevertheless possesses within itself power to retrieve the error; but it is not within the power of a State to reverse its action in ratifying an amendment of the Federal Constitution. Indeed, such last-named action is irrevocable, except a new amendment shall be submitted by Congress and shall be adopted by three-fourths of the States." And what is more, "if this prohibition amendment is to be carried by the necessary three-fourths of the States, it is to be greatly desired that those States should also represent the incontestable majority of the American people. For no such sweeping provisions of law should be imposed on the nation as a whole, overriding all local or regional diversities of opinion and custom in a vast territorial area, unless it had the sanction of a preponderant public opinion."

There is yet a stronger reason for claiming on behalf of the people at large an opportunity to express their

wishes. It is that their representatives in Congress have not been faithful to the trust confided to them. The Constitution authorizes the proposal of amendments by Congress "whenever two-thirds of both houses *shall deem it necessary*." This casts upon the members of the national legislature a distinct responsibility. They are not to propose amendments unless they deem them necessary. They are the first judges of that necessity. They are sent to Congress, among other things, for the purpose of determining that necessity. No doubt many members of the present Congress entertained a sincere conviction that the submission of the prohibition amendment was "necessary." But it is notorious that many did not. More than a few, disclaiming or evading their own primary responsibility, simply fell back upon the secondary responsibility of the State legislatures. The reaction of the people to this sort of conduct has been well expressed by a State senator of New York, who said, availing himself of the vigorous colloquialism of the day: "Passing the buck to the States may become a favorite sport of Congress in the near future, and there is no telling what sort of a constitutional amendment may be sent to us after the war for ratification. Ten years from now all sorts of socialistic ideas may be presented, and as Congress may find it convenient to dodge the issue by passing it on to the States, the voters ought to have a chance to say something about it." In the same strain, a correspondent of the *Springfield Republican* writes: "The truth is that the carrying through Congress in its actual

shape of this amendment was due to emotionalism, rather than to reasoned judgment. It argues either moral cowardice or intellectual deficiency on the part of the majority in Congress. It is deplorable in a high degree that there should not have been among the nation's law makers a sufficient number endowed with the attributes of sound statesmanship to shape the temperance sentiment which clamored for the adoption of the amendment into offering to the country a measure which would have given to the 'dry' elements of the country all the substantial benefits they asked for, and which, at the same time, would not have transgressed sound principles of government."

Those who desire to take the expressed will of the people as the guide for the decision of this question are accused of seeking its determination in a mode alien to that prescribed by the Constitution. But the objection has no force. It should be remembered that the Constitution would have author-

ized the ratification or rejection of the amendment by "conventions" in the several States, if that mode had been proposed by Congress. And at any rate, all that is asked is that the decision should be deferred until the States have elected legislatures specifically charged with the making of it. Further, those holding this view, in so far as they have been steady supporters of the system of representative government, are freely accused of inconsistency in being willing to go over the heads of the legislatures and back to the people, and it is said that, under the pressure of an emergency, they have conceded the advantages of "direct legislation" by the initiative and referendum. The answer is so obvious that the taunt should never have been made. This is not a matter of making laws by popular vote; it is a matter of amending a constitution. And popular referenda *on constitutional amendments*, at least in the States, have been not only the custom but the established practice in this country since the foundation of the Government.

Validity of the War Acts of Congress

Compulsory military service is not a new thing in the history of free governments. On the contrary, the essential principle of the conscription of man-power for national defense is deeply rooted in one of the oldest institutions of the English race. In describing the powers and duties of the sheriff of a county, Blackstone writes: "He is also to defend his county against any of the King's enemies when

they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him, which is called the *posse comitatus* or power of the county; and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning, under pain of fine and imprisonment." To raise an army by the draft

is nothing but an extension of this duty of uniting for the common defense from the narrow confines of a county to the broad boundaries of a nation. A national army so mobilized is nothing but the man-power of the State substituted for the "power of the county." And if it is objected that the *posse comitatus* could be summoned only for the defense of the county against enemies in the land, it should be answered that, in modern wars, the best way to repel an invasion is to strike the enemy before he can cross the sea, and that the best defense is a vigorous offense. Nor has it ever been considered an invasion of the rightful liberty of a freeman thus to require his physical service in defense of the State which protects and defends all that he has and all that he is. To quote the same judicious writer: "He puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier."

If the principle of universal military service can be traced no further back in English history than the reign of Alfred the Great, it is probably because, under the earlier Saxon kings, there was no conception of a national army as such, but the armed forces were local or tribal collections of fighting men, raised and led by their several dukes. At any rate, historians agree that Alfred established and organized a national military force which made soldiers of all the subjects of his dominion, that is, a force in which all freemen who were capable of bearing arms were enrolled and in which they

were expected to serve in time of need. The Norman conquest introduced the feudal system, which was nothing but a huge military hierarchy. But freedom came into its own again when the demand for the recognition of the people's liberties began to check the arbitrary power of kings. There was, however, no denial of the authority of the State, through one or another of its organs, to demand the service of all its citizens in the exigencies of war. English kings long struggled with Parliament for the exclusive control of the army, and the contest culminated in the provision of the bill of rights of 1688 that the maintenance of a standing army in the kingdom in time of peace is against law, unless it be with the consent of Parliament. But this only shifted the center of gravity. It placed the authority to raise an army and the process of doing so in the hands of the legislature, but cast no doubt upon the principle that that process might include the enforcement of military duty.

In America, military conscription has been an admitted right on the part of the Government, and a not infrequent practice from the earliest times. To quote from a recent opinion of the Supreme Court of the United States: "In the colonies before the separation from England there cannot be the slightest doubt that the right to enforce military service was unquestioned, and that practical effect was given to the power in many cases. Indeed, the brief of the Government contains a list of colonial acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Un-

der the Articles of Confederation, it is true, Congress had no such power, as its authority was absolutely limited to making calls upon the States for the military forces needed to create and maintain the army, each State being bound for its quota as called. But it is indisputable that the States, in response to the calls made upon them, met the situation when they deemed it necessary by directing enforced military service on the part of the citizens." Perhaps this is what Hamilton refers to in "The Federalist" when he speaks of "those oppressive expedients for raising men which were upon several occasions practiced, and which nothing but the enthusiasm of liberty would have induced the people to endure." It is known that the legislature of Virginia, in 1777, passed a conscription act which had been drafted by Thomas Jefferson himself, and that Washington, in the second year of his administration, transmitted to Congress a bill providing for compulsory military service which was drawn jointly by himself and Gen. Knox, who was then Secretary of War. There is an act of Congress passed in 1792, which, if it has never been fully enforced, has at any rate never been repealed, which provides that "every able-bodied male citizen of the respective States, resident therein, who is of the age of eighteen years and under the age of forty-five years, shall be enrolled in the militia." During the war of 1812 it was considered necessary to recruit the army by a draft, and plans for legislation to that effect were prepared, which intended that the United States should go directly to the body of citi-

zens between the ages of 18 and 45 (not the militia) and select a sufficient number for military service. These plans were drawn up by Monroe, then Secretary of War, and sanctioned by President Madison, but the early conclusion of peace rendered their enactment unnecessary. Again, during the progress of the Civil War, both North and South resorted to conscription. And when the government of the Confederacy adopted a selective draft law not very different from that in force in the United States today, it received the very careful consideration of the courts and its validity was fully sustained by the tribunals of at least six of the seceding States. A similar measure enacted by the Federal Government was approved by the Supreme Court of Pennsylvania, and, though it never came directly before the Supreme Court of the United States, there can be no doubt as to what the decision of that court would have been, having regard to its utterances on the general subject before and since. For instance, it has said, in speaking of the power of the Government to raise and support armies: "The execution of these powers falls within the line of its duties and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned." When the power of Congress to enact the draft law of 1863

was assailed, President Lincoln said: "Whether a power can be implied when it is not expressed has often been the subject of controversy, but this is the first case in which the degree of effrontery has been ventured upon of denying a power which is plainly and distinctly written down in the Constitution."

After all, that is the essential thing—the power is plainly written down in the Constitution. By that instrument the Congress is granted power to "declare war," to "raise and support armies," to "make rules for the government and regulation of the land and naval forces," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Congress is not given the power to "wage" war, because that belongs to the President as commander in chief. But to say that Congress may "declare" war and the President may "wage" war, and yet that neither of them singly nor both combined can take the measures necessary to prosecute the war to success would be immeasurably absurd. It was well said in the celebrated *Milligan Case*: "Congress has the power not only to raise and support armies but to declare war. It has therefore the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander in chief."

In the face of this body of historical and legal precedent, it is amazing that anyone should have entertained the hope that the courts might pronounce the draft law unconstitutional. Yet numerous attempts to evade or disobey the law were followed by the arrest of the offenders, and by their applications for release on the ground that the statute was beyond the rightful authority of Congress. In no reported case has this contention been sustained. The act was upheld as a valid exercise of the constitutional powers of Congress first by the Supreme Court of California, then by the United States district courts in Minnesota and Georgia, and then by the circuit court of appeals at New York. And finally, all objections on constitutional grounds, whether sincere or merely captious, to the conscription or selective draft act were disposed of by a decision of the Supreme Court of the United States rendered in January. We have not space to quote the whole of the learned and powerful opinion of Chief Justice White, but cannot forbear calling attention to some of his most incisive declarations. It was argued, so it appears from the opinion, that "compelled military service is repugnant to a free government and in conflict with all the great guaranties of the Constitution as to individual liberty," and therefore "it must be assumed that the authority to raise armies was intended to be limited to the right to call an army into existence counting alone upon the willingness of the citizen to do his duty in time of public need, that is, in time of war." But the Chief Justice answers:

"The premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion. It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. To do more than state the proposition is absolutely unnecessary in view of the practical illustration afforded by the almost universal legislation to that effect now in force." The act of Congress under review is "sanctioned by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the States under the Confederation, and of the Government since the formation of the Constitution." Finally, as to the ridiculous plea that to make a man a soldier is to enslave him, the court said: "As we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement."

The espionage bill, as originally introduced and debated, contained a very severe and unusual provision for the censorship of the press. This aroused great opposition, both within and without the halls of Congress, and it was finally omitted from the act as passed, although it was supported by the strong influence of the administration and the urgent representations of a member of the cabinet. It is extremely doubtful if it could have been brought within the scope of the war powers of Congress, broad as they are. For the First Amendment prohibits Congress from enacting any law "abridging the freedom of speech or of the press," and it cannot be admitted that one clause of the Constitution can cancel another, even under the stress of war, unless we are prepared to throw overboard the whole framework of our government. This was the position taken by Senator Borah in debate, who said: "That provision is more than an attack upon the liberties of the press. Even if the newspapers accepted it as a war measure, I doubt if it could be enforced. It is a provision that strikes at the fundamental rights of the whole people. Some senators seem to think that the Constitution is suspended in time of war. But that is absurd. The Constitution undoubtedly has some war powers that are latent in peace and which are active in war, but that does not mean that war suspends the Constitution itself."

But other provisions of the espionage act have been tested in the courts and sustained as valid. Such a case was before the circuit court of appeals

at New York in November. The first and second sections of the act exclude from the mails every letter, newspaper, or other publication which violates any provision of the statute, or which contains any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States. It was contended that this violated the First Amendment. But the court ruled otherwise, pointing out that the statute imposes no restraint on writing prior to its publication, and no restraint afterwards except as it restricts circulation through the mails; and that while liberty of circulation may be essential to the freedom of the press, yet liberty of circulating through the mails is not essential, so long as transportation in any other way is not forbidden. Again, it was argued that the statute ran counter to the Fifth Amendment; but the court decided that the complainant had not been deprived of liberty or property without due process of law, although the exclusion of its magazine from the mails by order of the Postmaster General, under the espionage act, had practically ruined its business. There was no doubt that the sheet in question was properly denied the privilege of the postal service, since it carried matter calculated and intended to obstruct recruiting or enlistment in the army. The court further pointed out that the act is not intended to repress legitimate criticism of Congress or of the officers of the government, or to prevent any proper discussion looking to the repeal of any legislation which may have been enacted, but only to prevent the dissemination and distribution through

the mail of publications intended to embarrass and defeat the government in the successful prosecution of the war.

Within the past year other statutes of transcendent importance have been enacted by Congress, all as war measures. Some of them impinge more deeply upon the normal freedom and independence of the people than anything before known in the history of our government. Others, not coming so directly home to the mass of citizens, do nevertheless seriously concern them in one way or another. Recall, for instance, the trading-with-the-enemy act, the act creating the shipping board, the war risk insurance act, the acts for the conservation and control of food products and fuel, the drastic revenue act, the appropriations of billions of dollars, the Liberty Loan acts. These have not been brought to the touchstone of conformity with the Constitution. Probably they never will be. Probably they are all perfectly valid exercises of the legislative power. He would be rash who should assert that any one of them exceeded the limits of those powers which the government has and must have in order that we may not exhibit the degrading spectacle of a nation vainglorious in peace and impotent in war. Yet the Constitution stands unshaken and unimpaired. This cannot be too often repeated. Many forget it; some do not believe it. In the course of the debate in the Senate on the food-control bill, a not undistinguished western senator, urging prompt action, is reported to have said: "It will not serve to excuse our inactivity or defeat proposed meth-

ods because of the cry 'unconstitutional.' The people are not so much concerned about our Constitution as they are about our institutions. The American people are in no mood to allow an obsolete paper constitution to defeat the preservation of the human constitution. Under the war powers of our government, the President commands and the Congress directs the methods of its performance." Such intemperate language need not be taken too seriously. But it is wholesome to contrast with it the strong declaration of the Supreme Court in the *Milligan Case*, which every American would do well to commit to memory: "The Con-

stitution of the United States is a law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence."

Taxes and Patriotism

The Federal income-tax law, as it stood prior to the enactment of the war-revenue act of October 3, 1917, was inequitable, undemocratic, and little short of iniquitous. Granting an entire exemption to incomes of \$3,000 or \$4,000 a year—an exemption which may fairly be called enormous, when it is compared with the corresponding provisions in the income-tax laws of practically all the other countries where revenue is raised by this means—it restricted the class of citizens called upon to contribute in this manner to the expenses of government to less than one-half of 1 per cent of the people. That is to say, one person in three or four hundred was subject to taxation, and continues subject to taxation, under the act of 1916. The taxes imposed by that statute are not so severe as to inflict material hardship upon

those having taxable incomes and therefore the ability to pay. But the effect upon the ninety-nine millions of Americans who were exempt was insidiously harmful and tended to become demoralizing. A personal interview with the collector of internal revenue, resulting in the handing over to that official of actual money or a certified check, is very apt to photograph upon the consciousness of the taxpayer the important fact that government is a costly institution, that citizens have duties and responsibilities as well as rights, and that he, immediately and individually, has an interest in what his government is doing and what it is spending. But the enormous majority of the people, hitherto, have not consciously paid any taxes at all to the national government. In other words, the payment of an in-

direct tax is wont to be so successfully camouflaged that the matter of its final incidence is only vaguely within the apprehension of the ultimate consumer. To these millions, therefore, the income tax has been a matter of academic interest only, or they have regarded it as a wholesome purge administered to the possessors of swollen fortunes. They have been interested only in the *spending* of a vast fund raised by enforced contributions from a relatively small group of their fellow citizens. Why, then, should they feel any concern over the extravagant and increasing cost of government? They have, on the contrary, been often and vociferously urged to invent new ways of spending the public money, chiefly in the form of governmental benevolences. This seems a very inapt way to inculcate civic virtue and teach the responsibilities of citizenship. If words have not lost their meaning, it should need no elaborate argument to show that any true conception of a democratic form of government must involve the participation of every citizen not only in the benefits of government, but also, according to his means, in the bearing of its burdens. It was well said by a thoughtful writer: "We must remember that every graded tax should if possible be collected, if only to a trifling amount, from the lower incomes also. Every citizen should have an interest in the government, and with that interest he should have the sense of responsibility that goes with bearing his share in its cost. The growth of a great mass of voters who had lost their sense of responsibility would be a calamity. The business ex-

ploitation and price extortions practiced by privileged combines and cliques have tempted us in this direction, but we cannot achieve progress by exempting the poorer vote from all taxation; rather we must bring to both rich and poor alike a keen sense of the matchless service that our government can perform if it is properly supported and financed by all classes, and is in this real sense a government of all the people."

A long step in the right direction was taken when the act of 1917 lowered the exemption for unmarried persons from \$3,000 to \$1,000 and for heads of families from \$4,000 to \$2,000. It may be pessimistic to believe that this never could have been brought about by arguments addressed to Congress. Economic and sociologic arguments for taking the long step were abundant and obvious. But under any other circumstances than those which actually attended its taking, it would have been immensely unpopular. It was forced by the tremendous financial exigencies of the war. It took a cataclysm to bring it about. But at any rate the step has been taken. It may be retraced. Probably it will be when the war is over. But in the meantime, the Commissioner of Internal Revenue has stated that seven million people who never before paid an income tax will now be called upon to do so; and if, in the next few years, their participation in the common burdens shall have sown in the minds of these seven millions a realizing sense of the responsibilities of citizenship, or brought to fruition a sense before inert, the nation's spiritual profit will

be incalculably great. No man of good heart has ever desired to increase the burdens of the poor and the moderately well-to-do. And undoubtedly they are increased by the new taxes. The cause of satisfaction lies not at all in that mere fact. It lies in the assured progress towards a fuller realization of democracy. For democracy, as a form of government, is a barren pretense unless it first exists as a brotherhood of feeling, of purpose, and of service.

The writer of this article believes that the vast majority of those millions to whom the bite of the income tax now becomes a personal experience are shouldering their new responsibilities without grumbling or complaint. It rejoices him to observe that his fellow citizens who are in this situation are manifesting something much better than a patient acquiescence; they are showing a staunch and cheerful loyalty, and a fine satisfaction in thus "doing their bit." Taxes and patriotism for once go hand in hand.

But reactionary voices are not silent. Unhappily it must be said that there are still those who clamor to be exempted from the burdens which it should be their glory to share. The newspapers have given scant publicity to the proceedings of what was called a "Conference on Democratic Financing of the War," which was held at Washington last January, and which is stated to have been "called at the request of leaders in labor and farmer organizations." The presiding officer "declared that the sentiment of the laboring classes was unequivocally

against bond issues for financing the war, and in favor of revenue raising by means of various forms of taxation." These forms of taxation were described by other speakers, one of whom advocated taxation at the rate of 100 per cent on all incomes in excess of \$100,000 a year, while others urged the imposition of taxes to the extent of 80 per cent or more on such incomes, on excess profits, and on unimproved lands. One of those who addressed the conference is reported to have said: "We have within our grasp actual democracy—democracy that means something in the life of the farmer of Kansas and the hogsticker of Chicago. And the workers are determined that they shall not be deprived of this new democracy. The only sure way is for labor to demand, step by step, that wealth shall be taken as men are taken, for the common good in the common fight. They are determined that they will not die while those whose object is the amassing of great profits remain to hoard new power through enormously increased wealth. But in plain, simple words this means that wealth must be taken. We are glad that so much has been taken; it is a great step forward; but more and yet more must be taken." These are high-sounding words, and not without a certain plausibility. But the "actual democracy" of the speaker is seen to mean not only the financing of the war by means of the conscription of wealth, but the continuance over into times of peace of a system under which the wealthy would pay all the taxes, and the multitude would enjoy such "actual democracy" as may consist in

a community of exemption from contributing to the support of the state. This is brought out more specifically in a speech of John Spargo at the same conference, in which he advocated the removal of the federal income tax from all incomes of \$5,000 and less, and "tremendous increases" in the tax on

larger incomes, with correspondingly advanced taxes on excess profits. There is nothing new in this demand. It has been urged only too often. But its resurgence at this time would be disquieting if one believed that its supporters were really numerous or influential.

Beginning Another Year

On entering upon its second year, THE CONSTITUTIONAL REVIEW has a few words to say in regard to its past accomplishments and what it hopes to do in the future. First, it desires to thank its friends and readers and its honored contributors for the interest they have shown and the unstinted encouragement they have given it. If one may judge from the expressions of praise which have been accorded to the magazine as a whole, to particular issues of it, or to special articles printed in it, the REVIEW might feel entitled to regard itself with a certain modest measure of pride, or at least be inspired with the hope that it may increasingly deserve the generous approbation which has not been withheld from it. But it would welcome criticism and by no means disdain advice. For its prosperity is built upon the interest of those who read it, and within the limits of its general purpose and character, it will shape itself to their wishes.

THE CONSTITUTIONAL REVIEW is published by the National Association for Constitutional Government. By direction of the Executive Committee of that Association, the editorial office was opened March first, 1917, and the

publication of the REVIEW as a quarterly magazine of 64 pages was commenced. Four numbers preceding the present one have been issued, namely, on the first day of April, July, and October, 1917, these constituting the first volume, and on first of January, 1918, beginning the second volume. The editor has been fortunate in securing interesting and important contributions (in some cases articles or addresses reprinted by permission, but for the most part original communications) from writers of note and of authority, including Hon. William H. Taft, Hon. David Jayne Hill, Hon. Job E. Hedges, Hon. Ira J. Williams, and President Nicholas Murray Butler, Professor Doughty of Williams, and Professor Long of Washington and Lee. Other contributions of equal value and interest have been promised for the near future or are already in preparation. As this much has been accomplished almost at the inception of the enterprise, and as the magazine is beginning to make a place for itself in our more serious periodical literature, and to attract increasing interest and attention, the editor is encouraged to believe that he will be able, from number to number, to fill the

columns with matter well worth study on the part of the readers and not below the standard of merit which the REVIEW has already set for itself.

Our appeal is necessarily to a limited class of readers, men and women of an intellectual type who are sincerely and actively interested in the most important of all human problems—that of maintaining just and efficient popular government under the protection of strong and enduring written constitutions. In view of this fact and of the short time the REVIEW has been in existence, it is gratifying to note that it is steadily building up an encouraging list of subscribers, independent, that is to say, of the members of the National Association for Constitutional Government, to whom the magazine is sent as a privilege of their membership. The readers spoken of are individuals, libraries, colleges, and other institutions whose subscriptions have been based upon their opinion of the REVIEW itself, without any reference to the Association. A study of geographical distribution shows that the magazine goes into every state and territory of the Union, save perhaps one or two. So that it may be said, with but little reservation, that it is read in every part of Continental America, as well as in Hawaii and Alaska. A goodly number of the leading colleges and universities of the United States have favored us with subscriptions, and so also have various state and municipal libraries and bar associations.

But the number of names on the mailing list should be multiplied many times. To effect this, we solicit the aid

of our friends. If you—the individual “you” who are now reading these lines—if you find the REVIEW interesting and attractive, if you believe that it preaches sound doctrine on the principles of liberty, good government, and true patriotism, if you believe that this is a time, above all other times, when the widest possible publicity should be given to all studies and pronouncements of sound doctrine on these vital matters—then lend a hand; show the REVIEW to your friends and acquaintances; give it a word of commendation; order it mailed to a man or two who ought to have it; present a subscription to your public library.

A word about the National Association for Constitutional Government, to those who are not already members of it. The purpose of this non-partisan and purely patriotic body is thus set forth in its constitution; “It shall be the object of the Association to propagate a wider and more accurate knowledge of the Constitution of the United States, and of the distinctive features of constitutional government as conceived by the founders of the Republic; to inculcate an intelligent and genuine respect for the organic law of the land; to bring to the minds of the people a realization of the vital necessity of preserving it unimpaired, and particularly in respect to its broad limitations upon the legislative power and its guaranties of the fundamental rights of life, liberty, and property; and to oppose attempted changes in it which tend to destroy or impair the efficacy of those guaranties, or which are not founded upon the mature consideration and deliberate choice of the people as a whole.”

The editorial policy of the REVIEW is in thorough accord with the well-defined platform and purpose of the Association. It describes itself as a magazine "advocating the maintenance of constitutional government and recording its progress at home and abroad." It is a part of its purpose to keep its readers informed of the interesting changes and developments in the systems of constitutional government in the several states and in foreign countries. And these are stirring and most interesting times, when dynasties come crashing to earth and new republics spring up overnight. But also,

recognizing the fact that the mission of the Association is distinctly educative, a chief aim of the REVIEW is to carry on the propaganda of the Association by the presentation of sound and well-reasoned articles by writers of recognized ability and authority. In this, its service is not so much to instruct the members of the Association as to furnish them with ammunition by means of which they, personally and individually, may help to spread the doctrines for which the Association stands and combat the rising tide of untempered radicalism.

Comparative Constitutional Law, and An Explanation

The Hon. Mr. Justice Riddell, a distinguished member of the Supreme Court of Ontario, and well known both there and in the United States as an eminent authority on constitutional law, has favored our readers with an extremely interesting and valuable article on the practical working of the constitution of his country under the stress of wartime conditions, the first installment of which is printed in this number. Last year Justice Riddell delivered a course of lectures at Yale, on the Dodge foundation, which were afterwards presented to the public in book form under the title "The Constitution of Canada in Its History and Practical Working." The editor of this review had much pleasure and profit in reading that volume, and said so in a notice of it which he wrote and which will be found in the October, 1917, number of the REVIEW, at page

193. But it appears that in his remarks upon the constitutional protection of private rights and property in Canada as compared with the United States he may have laid himself open to misconception. It is no less a pleasure than a duty to give publicity to the following communication from Mr. Justice Riddell:

"Dear Sir: I desire to thank you for the courteous and appreciative review of my Dodge Lectures in your October number. 'Nevertheless, I have somewhat against thee.' You seem to question my statement that 'in Canada nobody is at all afraid that his property will be taken from him; it never is in the ordinary case. Our people are honest as peoples go, and would not for a moment support a government which did actually steal; a new government would be voted into power and the wrong righted,' and you suggest that

the case of *Florence v. Cobalt* (1908), 18 Ont. L. R., 275, indicates something different. I can quite understand your views. It may be that I, like a much greater man, have a single-track mind. At all events, when, in the Dodge Lectures, I used the language you quote, I was discussing legal power only, *ultra vires* or *intra vires*. I had not in mind anything but law, and did not mention all the facts. At the trial I treated the case as one purely of law, and held that, assuming that the plaintiff company had the ownership of the land, the legislature could legally take it away. In the court of appeals the other tack was taken. That court went into the facts and held that the plaintiffs had not made out their claim. The Judicial Committee pursued the same course, with the same result. Both courts agreed with me as to the law, the court of appeals devoting three pages to the law as against ten on the facts, the Judicial Committee two and a half pages to the facts and one short sentence to the law. I was assured by the Prime Minister of Ontario, Sir James Whitney, that if the courts should hold that the plaintiff company made out a case on the facts, they would be compensated as for property taken by eminent domain. The matter was spoken to in the House of Assembly, and the same ground was taken by the Government. No one who knows anything of our political methods in Canada will need to be told that if a government could be rightly accused of taking private property without just compensation, it would stand little chance at an election. Consequently, no government has ever done such a

thing. It has always been sure of the facts, and 'nobody is at all afraid that his property will be taken from him.' Will you let me add that I have not a scrap of the missionary spirit about me. We Canadians are too poor and too busy to bother about recommending our constitution to others. All we care about is to see that it is made to suit us. We are always glad to explain it, but we do not imagine it will suit all others. We say with Burke: 'If you ask me what a free government is, I answer that it is what the people think so, and that they, and not I, are the natural, lawful, and competent judges of the matter.' I, of course, understand that the American people, lawyers and others, prefer their own Constitution. All peoples have the constitution they deserve; all free peoples the constitution they prefer; if it did not suit them, they would change it. William Renwick Riddell."

Now, it may be conceded that no intelligent person would doubt the entire willingness of any government which might be in power in Canada to make just compensation to any person whose property was taken from him by governmental act or authority. And yet it may well be (and this is all the reviewer meant to say) that people in the United States, long habituated to the strict limitations upon the legislative power in their own constitutions, whereby they have sought to safeguard the rights and liberties of the individual, feel more secure in knowing that the legislature *cannot legally* do certain things (the courts would not let them) than if the protection of their rights depended upon the willingness

of the legislature to do justice or the fear of political consequences. And it may be worthy of passing mention that, under our system, the property of one private person cannot be taken from him and bestowed upon another *even* with just compensation made. With us the power of eminent domain extends only to the taking of private property "for public use." But in all this no criticism of the constitution of Canada was or is intended. History shows that it has worked well. And, of course, the people have been secure under it in their rights and liberties.

If it had been otherwise, the constitution would have been changed. The reviewer meant to call attention to certain matters of difference in constitutional law and practice, but without any claim of superior excellence on either side. And if, as a fruit of such discussions, thoughtful people on both sides of the international line may come to a better understanding of their neighbors' institutions and their methods of reconciling liberty with government, it cannot but be to their advantage.

Important Articles in Current Magazines

"The Cabinet in Congress"

Early American statesmen laid great stress upon the strict apportionment of powers as between the three departments of government. While recognizing the advantage, or even necessity, of admitting the executive to a certain measure of participation in the work of the legislative body, and vice versa, they restricted this blending of functions within very narrow and carefully defined limits, fearing that otherwise the liberties of the Republic would be jeopardized and the entrance of tyranny made easy. Modern American statesmen, in great and increasing numbers, challenge the ancient maxims. They doubt whether the doctrine of the separation of governmental powers ever rested on a sure foundation. In revising or even abandoning it, they see no danger to the liberties of the the Republic. They urge the great need of promoting efficiency in the business of government, and find that the prime requisite is not the separation but the better co-ordination of the executive and legislative branches. No one can be blind to the fact that, within the last generation, and both in national and state governments, the influence and leadership of the executive, if not the constitutional power of the executive, have grown enormously at the expense of the legislative department. Proposals for changes in the constitutions and laws looking in this direction, put forward by philosophical writers, governors, politicians, and

members of constitutional conventions, have contemplated either a still further extension of the executive power or the enactment of measures which would bring within the pale of strict legality certain practices and methods, now grown familiar, but which at best must be described as extra-constitutional.

It is to the latter class of proposals that we must assign the suggestion that members of the cabinet should have seats in one or both houses of Congress, with the right to speak to pending measures and the duty to answer interrogations, advanced by Mr. Francis E. Leupp, in his interesting article, "The Cabinet in Congress," in the *Atlantic Monthly* for December, 1917. "The idea," he says, "is not to revolutionize our system of government, or even to expand the powers of any part of it, but merely to seat the nearest representatives of the President where they can answer questions or make suggestions concerning pending legislation as he might if present in person." We should remind ourselves, he thinks, that the Constitution lays as much stress on the mutual interdependence as on the mutual independence of Congress and the President. "The great lesson of the Civil War was that the strength of our nation lies not in a jealous aloofness between its several organs but in their sympathetic co-operation. The desire of the foremost modern students of constitutional government to bring the President into the most intimate practicable relation with Congress, therefore, does not

mean that they would have the President make or Congress execute the laws; their aim is merely to place a practical interpretation on the requirements that the President shall give the lawmakers 'information of the state of the Union and recommend to their consideration such measures as he shall deem necessary and expedient,' and that Congress, thus informed and advised shall make 'all laws which shall be necessary and proper' for carrying into execution the powers vested in any officer of the United States."

Three important advantages would accrue, as Mr. Leupp believes, from seating the heads of departments in Congress. First, with the best intentions in the world, Congress often blunders sadly in its enactments for the lack of exact information upon specific details. This would not happen if the cabinet minister possessing precisely the needed facts and figures were present in committee or in debate, and if it were his duty either to volunteer or to supply on request what the legislators should learn. Secondly, at his place on the floor of Congress a member of the cabinet would stand as the spokesman of the administration. By explaining clearly and with authority the attitude of the President towards a pending bill, or his wishes in regard to contemplated legislation, he would be able to avoid disastrous misunderstandings and possible vetoes. And, thirdly, the adoption of such a plan would result in the choice of stronger men to make up the cabinet. "Political expediency is not a consideration which a President could afford to let influence him in choosing a cabinet

officer, if he knew that the man of his choice would have to stand before Congress in person and act as his mouthpiece."

But actually members of the cabinet do frequently appear before committees of Congress for the purpose of laying before them the information which is necessary to a thorough understanding of the conditions on which proposed legislation is to be predicated. Congress can always have such information if it really wants it. True, if a department head had a seat in the House, he could rise in his place to correct false impressions, present statements of facts, or otherwise guide the course of legislation in the right channels. But can anyone imagine a house of Congress, through its proper committee, refusing to hear a cabinet minister who desired to address it or to lay a statement before it? The question is answered if one remembers the long examination of Mr. Secretary Baker before a committee of the Senate in January. As to the advisability of having a presidential mouthpiece always present in Congress, no one of our recent presidents has hesitated for a moment to tell Congress what was his attitude towards any pending bill or to express in concrete form his views as to expedient legislation. Nor have Presidents hesitated to employ cabinet ministers as their spokesmen in these matters. Complete drafts of bills are not uncommonly prepared in the executive departments and handed to some member of Congress for introduction. In fact, we have come to speak of "administration bills" as glibly as if we had always lived under

the English system of government. With the secretaries of the ten great departments made members of the legislative branch, there would be this advantage, that the administration and its chief officers could accomplish frankly and legally what they are now obliged to effect by methods which appear (to some of us, at least) like tolerated evasions of strict constitutional practice. Not at all in the way of criticism, but as a pertinent illustration of actual conditions, we quote the following from the news columns of the *Washington Evening Star* of May 4, 1917: "The influence of President Wilson's approval of the newspaper censorship section of the espionage bill failed to save it in the House today, and it was stricken from the bill by a vote of 220 to 167. The vote came after administration leaders had fought for the section under a hot fire of attack, and Chairman Webb of the Judiciary Committee had told the House he had just heard from President Wilson that the section was necessary to the defense and safety of the country. Postmaster General Burleson, who often visits the capitol to round up support for administration measures, made a futile attempt to get enough support for the censorship section. * * * Representative Webb of North Carolina, chairman of the House Committee on the Judiciary, did everything in his power to rally to his support enough votes to give the administration almost unheard-of power in proclaiming what may or may not be published. In addition, Postmaster General Burleson was in the corridors and lobbies of the House for several hours today in a

vain attempt to preserve the censorship section by telling members on both sides of the House that the administration absolutely demanded it." Perhaps it would be expedient if members of the cabinet were authorized to address a house of Congress from its own floor rather than from any other place. But a much more important question than that which Mr. Leupp propounds, and which is going to be asked before long and which must be answered, is this: Shall our plan of government be so changed as to give the President, either in person or through the heads of departments, a direct right of initiative in legislation?

"Breaking the Labor Truce"

Admitting the perfect legal right of workingmen to organize themselves into unions, it has always been the law that there exists a correlative right on the part of an employer to run an "open shop," if he so chooses, or to employ only non-union labor. About four years ago, in the coal regions of West Virginia, an attempt was made to coerce a certain mining company into acceptance of the closed shop (employing none but union miners) by sending "organizers" among its men, enrolling them in the union, and then, when a sufficient number had been gained over, calling a strike, which could be broken only by the company's submission to the demands of the union. Upon the company's application to a Federal court, it was decided that this was a conspiracy to injure the company in respect to its rights and property which should be restrained

by injunction, and it was so ordered. This decision was recently affirmed by the Supreme Court of the United States. There was nothing revolutionary, not even anything new, in the decision of the latter court. It merely stated what the law is and always has been, and decided the case accordingly. The gist of the decision may be seen in the following quotation from the opinion: "The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union, and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power."

Yet, under the caption which stands at the head of this article, this decision has been made the subject of a stupid and mischievous attack upon the Supreme Court by *The New Republic* in its issue of December 22, 1917. In the course of the editor's comment on the case, it was said: "The decision will confirm the popular feeling, already strengthened by recent constitu-

tional decisions, that a majority of the Supreme Court are endeavoring to enforce their own reactionary views of public policy, in direct opposition to the more enlightened views prevailing in legislatures and among the public. For there was no statute and no binding precedent to justify the decision. It was derived solely from the court's conception of the policy of the law, from its judgment of the proper balance of interests in an industrial conflict."

We have called this attack both "stupid" and "mischievous." If it is the former, it certainly is the latter. And its stupidity is shown in a misstatement of recent judicial history and in an utter failure to understand how and why a court of justice decides cases. For, in the first place, it is certainly not true that the justices of the Supreme Court entertain reactionary views of public policy, and still less true that they are endeavoring to enforce them. On the contrary, ever since the era of "progressive" legislation began, they have consistently shown themselves not only willing but anxious to give effect to the will of the people, as expressed in enactments of that character, whenever and wherever it was legally possible to do so. Indeed, it is not too much to say that, for this purpose, they have more than once strained constitutional barriers to the cracking point. This was demonstrated in an article entitled "Progressive Legislation, the Constitution, and the Supreme Court," in the January number of this REVIEW, pages 19-29. One who has not made himself familiar with the decisions has no right to charge the judges with reactionary

tendencies or any other kind of tendencies, for he does not know the facts. But one who does know the decisions and yet persists in this mischievous accusation might not unfairly be likened to the scriptural "deaf adder that stoppeth her ear."

In the next place, no honest court ever undertakes to decide any case in accordance with its own views of "public policy." In fact, public policy is something which does not even come within the sphere of a court's consciousness except in so far as it is explicitly set forth in constitutional and statutory laws. The definition of the public policy of a state or nation is for its legislative body, not for its courts. The mistake lies in supposing that the functions of a court in applying law to cases are elastic—that it can, if it chooses, disregard statutes and precedents and adjudge the rights of litigants in accordance with sentiment, public opinion, or the views of editors. All these may furnish a perfectly legitimate basis for the enactment of a new law. But courts do not enact laws. Courts are held within strict and narrow boundaries. They must take the law exactly as they find it and apply it impartially. A judge who should decide a case before him in accordance with his personal opinion of what the law ought to be would be guilty of encroaching upon the prerogatives of the legislature. A judge who should decide a case in accordance with a rule or a sentiment which he knew was not the law would be guilty of a betrayal of trust. And it will not be a happy day for our country when our judges

begin deciding cases in accordance with "views prevailing among the public," whether enlightened or otherwise.

"The Bases of Democracy in China"

The natural skepticism of the western mind towards the possibility of maintaining anything like a really popular and democratic form of government in the most ancient of empires furnishes the occasion for an interesting article entitled "The Bases of Democracy in China," by Mr. Kia Lok Yen, of the University of Chicago, in the *International Journal of Ethics* for January, 1918. The author posits his occidental acquaintance as saying: "If anything is unthinkable, unbelievable, and even ridiculous, it is China's becoming a republic." And yet a republic has come into existence in China; and a fact is a fact, and there must be some reason for it. The explanation is that the westerner has dwelt too much upon the theoretically unlimited power of the emperor, under the old regime, as the Son of Heaven, upon the occasionally tyrannous behavior of governors and subordinate rulers, the fixity of caste, the prevalence of graft, and the immutability of institutions, and has given too little attention to the forms of organization, the political practices, and the popular philosophy which have governed the every-day life of the Chinese people. In effect, as this writer tells us, "the local self-governments have proved so efficient in managing their own affairs that the common uneducated people today often declare that they fail to see anything

that is considered important by the republicans which they have not had before." In China, the family is the social as well as the political unit. So strong is the bond of kinship that it is not uncommon to find four or five generations living in the same household. And however large the group, "the family is a living organism, possessing a spirit distinct from the individuals constituting it. Each member works for the family, and not for himself alone. The earnings of all the members are to be turned in to support the whole family, and every member has a claim on the earnings of every other." Moreover, the family as a whole is responsible for the civil and criminal liabilities of each member. All the property of all the family is vested in the father, as its head and representative, and his control over the life and activities of the group, as here described, remind one strongly of the "patria protestas" of the Romans. So far we seem to perceive a patriarchal system of government rather than democratic. But stretching out beyond the family is what our author prefers to call the "greater family," rather than the "tribe" or "clan," of which the important characteristic is the maintenance of the "ancestral hall," an institution not devoted to purposes of worship alone, but which has very important functions in regulating the social, economic, educational, and judicial relations of the individual members. It has its own property, and to a certain extent acts as a mutual loan association and a clearing house. Its records are carefully kept. It provides schools. It is likewise a court of arbi-

tration whose judgments, though not legally compulsory, are always obeyed for the sake of family pride. And the important detail is that its affairs are administered by a board of elders, varying in number, who are elected by popular vote for a definite term. "Thus the greater family too is an organism having a spirit of its own distinctly apart from those of the individual families constituting it. Within it exists a representative and co-operative system where all the members enjoy the same rights and privileges and discharge the same duties and obligations. Here too it should be strongly emphasized that harmony and co-operation are not attained at the expense of individuality." Beyond this sphere lies the village, which, when it includes more than one clan or group, is organized on exactly the same principle, being governed by a board of elders elected by and from the representatives of the various groups, so that "the relation between the village and the group organizations is precisely the same as that between the group and the families or between the family and the individuals."

There are also economic and industrial institutions that have long spread the leaven of democracy throughout China, particularly the merchants' and artisans' guilds. Each of these organizations is administered by a president, secretary, and executive board, all elected annually by popular vote. It is their office to settle disputes arising between their own members and controversies with other guilds, to fix the rate of exchange and of interest and the date for the settlement of accounts,

and to discharge many of the functions of a board of trade, a city council, a board of charities, and a council of arbitration. An authoritative writer on Chinese affairs is quoted as saying: "The democratic management of industrial and economic affairs through the guilds, and the democratic origin of industrial and commercial law, furnish the historic and economic basis for the democratic character of Chinese civilization."

But conceding all this, the western mind cannot blink the fact that the general or central government was essentially a despotism, pure and simple. The theoretical correctness of this view the author frankly grants. But whatever were the theoretical powers of the emperor, the method by which he ruled the country had necessarily curtailed his authority to such an extent that he had to do almost as the people pleased. Actual contact of the general government with the people was only through the rulers of the provinces, districts, and counties, and "the duties of these officials consisted mainly in keeping order and collecting the taxes from their respective territories." "The only obligation the people had towards the central government was the payment of taxes, which were generally very small in comparison with those of the

western countries." What is more, we should not lose sight of the influence of the teachings of Confucius and his followers, combining religion, morals, and political philosophy. Our author is positive that the popular idea of government, as derived from or founded upon Confucianism is expressed in these maxims: "Government should be by the consent of the governed; moral agencies rather than physical forces should be employed; the ablest, wisest, most experienced, and most virtuous are indispensable for a good government; there rests with the people the right to depose any ruler whose conduct they do not approve." "It is true," he says, "that the king is generally called the Son of Heaven, and that in latter times this has been taken to mean appointed by Heaven; but then Heaven does not see nor does it hear. Heaven sees when the people see; Heaven hears when the people hear." And thus "the popular idea of government frankly accepts the divine right of the king. But then it turns right around and robs him of this right and vests it in the people by identifying the will of Heaven with that of the people themselves—a logical defect in Chinese philosophy which seemingly proves in this case to be a blessing and not a curse."

Book Reviews

THE FUNDAMENTAL LAW OF AMERICAN CONSTITUTIONS. By Fred A. Baker, of the Detroit Bar, and Lecturer on Constitutional Law and History in the University of Detroit. Washington, D. C.: John Byrne & Co., 1916. Three volumes. Pp. 1077.

Mr. Baker began his legal training in Michigan at a time when the Supreme Court of that State, always of highly respectable authority, enjoyed the singular pre-eminence of numbering in its membership no less than three great constitutional lawyers at one time, Cooley, Christiancy, and Campbell. He has well carried on the great tradition of sound scholarship, extensive historical research, and clear thinking and expression in matters of constitutional law, and has rendered important service to the youth of his State in presenting the fruits of his labor in the form of a series of lectures on the fundamental principles of American constitutional law, delivered at the University of Detroit. These lectures have been collected and printed in the volumes before us, and are thus made available to a wider circle of readers. The work is primarily intended for students at law, and Mr. Baker rightly contends that in our country, where the rules and principles of the Federal and State constitutions so intimately permeate the details of governmental action, and where lawyers take so large a part in the making, executing, and interpreting of the laws, a thorough

knowledge of constitutional law and practice is of the utmost importance. "No lawyer," he says, "is qualified to practise his profession unless he is well grounded in the fundamental law of his country; without it he is like a machine without a balance wheel, or a ship without a rudder." Equally important is such a knowledge to all those who aspire to lead public opinion or to play a part in the momentous business of government, and it cannot but be that there are many who would profit by an acquaintance with Mr. Baker's excellent work.

It reviews in detail the topics of the sovereignty of the people, the division of the powers of government, the constitution and administration of the legislative, executive, and judicial departments, and the guarantees of public and private freedom. It is unquestionably true, as Mr. Baker more than once insists, that no study of constitutional law can be complete or even adequate which confines itself to the text of the constitutions or to a reading of the decisions in which the courts have applied constitutional rules to concrete facts before them. For all the great principles which are concerned with the system of representative government, the apportionment of powers, or the liberties of the citizen have their roots deep in the past, and extensive studies in political history are necessary to a full comprehension of them. This is therefore Mr. Baker's method of teaching constitutional law, and his historical sources range from the observations of Caesar

and Tacitus on the institutions of the Teutonic tribes to the decision of the Supreme Court in the income-tax case. Extensive quotations from historical documents, such as Magna Charta and the other great monuments of English political history, the arguments and decisions in such notable cases as those of John Hampden and the trial of the seven bishops, and the most important judgments of our own courts, the early American constitutions, and, generally, the primary sources out of which constitutional history and law have grown, combined with the author's own explanations and illuminating comments, furnish a valuable compendium for anyone who wishes to study the growth of liberty under the protection of constitutions and courts in its historical entirety, or the origin and development of a particular principle. To take but a single example, the principle that the power of imposing taxation resides solely in the representatives of the people, we find our author tracing this doctrine from its faintest beginning to its ultimate triumph by an elaborate study of English history from the introduction of the feudal system under William the Conqueror, through the charter of Henry I, the great charter of King John and its numerous confirmations, the struggles between Parliament and the Stuart kings, the petition of right, the Ship-Money case, the constitutional documents of the commonwealth and the protectorate, to the bill of rights of 1689.

With the respect for the written law which is naturally engendered by such traditions, such study, and such a course of teaching, Mr. Baker is con-

servative in his views. Radicals who would advocate eviscerating the constitutions to get rid of their inconvenient limitations will take little aid and comfort from his book. On the other hand, those who believe that all that is worth preserving in American life depends on the maintenance of constitutional and representative government will find much in it to encourage and arm them. Of direct popular legislation, for instance, he has this to say: "The initiative and referendum has not one redeeming feature; it is one of the hysterical movements of the present time. Governors are prohibited from interposing their veto, and it is seriously proposed to provide in addition for the recall of judges and judicial decisions on constitutional questions. Our expectation is that this kind of government will be short lived, that the experiment will be found wanting in merit, that it will prove obnoxious to sane and sound government, and that desuetude will be its grave."

* * *

CITIZENSHIP; AN INTRODUCTION TO SOCIAL ETHICS. By Milton Bennion, Dean of the School of Education, University of Utah. Yonkers-on-Hudson: World Book Company, 1917. Pp. 181.

This book differs from many others of the same general kind in that the author looks at government not as a regimen necessary to restrain the waywardness of man, nor as an aggregate of cunning contrivances, but as the outcome and flower of civilization; and citizenship, not as status or a privilege,

but as the source of numerous duties. Hence the emphasis is laid upon the solidarity of society on the one hand and on the prime requisite of service on the other hand. It is not true that the state exists for the individual, nor that the individual exists for the state, but in some measure each exists for the other and for both; and all institutions are good or bad according as they are "social" or "anti-social." The forms and functions of government, national, state, and municipal, are passed under review, and attention is given to the theories of public economics and administration and the relation of the state to social institutions, labor, the conservation of natural resources, vocational training, the electoral privilege, and international law. But in all cases the outlook is not historical or political, but ethical. The book, in fact, is not meant to take the place of works on "civics" or "government," but to serve as an introduction to them. It is, as the sub-title indicates, an introduction to social ethics. It is from this angle that the author registers his approval of the single tax, national prohibition, and suffrage for women—three important subjects which are susceptible of a wider discussion than he is able to give them within the limits of a small volume, and which, it may be thought, are proper for the consideration of more mature minds than those of high-school pupils.

Dean Bennion is unquestionably right in thinking that instruction in the elements of political science, as a preparation for intelligent and effective citizenship, should begin at least as early as the third year of the high-school course. His work has merit

and will no doubt serve a useful purpose. But it fails in that point which should be the very beginning of all instruction in these subjects, that is, a textual and historical study of the written constitutions. The institutions of government cannot be understood by merely watching them in action; the pupil must be taught how and why they came to exist. Without minimizing social ethics and the duty of service, equal stress should be laid upon the American citizen's magnificent heritage of rights and liberties; and these must be looked for in the constitutions. The student who may be moved to inquire: "What is a constitution for? How does it differ from any other kind of law? Is it important for me to know anything about it? Does it concern me practically in any way?"—will get no help from the book under review. Half a page is all the author requires in which to say what he thinks necessary in regard to the Constitution of the United States and those of the several States.

* * *

AMERICAN GOVERNMENT AND MAJORITY RULE. A Study in American Political Development. By Edward Elliott, Ph. D. Princeton University Press, Princeton, N. J., 1916. Pp. 175. \$1.25 net.

It is the belief of the author of this interesting work that "the people of the United States have been hindered in the attainment of democracy, or the rule of the majority, by the form of government through which they have been compelled to act. The framers of the Constitution of the United States and of the States sought to pre-

vent the immediate and direct rule of the numerical majority upon the theory that all government was by nature evil and that the people might become as tyrannical as any king." The republican form of government has been popular and has been universally accepted as the ideal system, but this fact has prevented us from realizing the true condition. Many attempts, all unsuccessful, have been made to restore the government to the people. Nor is this all. Far from regarding government as a necessary evil, "we are eager to have it undertake a wide field of activity in behalf of the social well being," but find that "government is neither equipped with the necessary authority nor fashioned for efficiency in performing these new tasks." It is Professor Elliott's task to develop this thesis by an historical and critical study of the development of American political institutions, and then offer suggestions for the solution of the problem of efficient and beneficent government by the people.

In late years "new agencies for the expression of the popular will have been created—some co-ordinate with, some superior to, the old ones. These new institutions of democracy are the commission form of government in municipalities, the initiative, the referendum, and the recall." As to the first-named the author considers it as "a distinct step toward the possibility of real majority rule." As to the others, he rightly observes that "in the initiative and the referendum, violent hands are laid upon the old theory, and ciple that the rule of the majority a new principle is introduced, the prin-

should be made easy, not difficult. To this extent the fundamentally illogical theory of a government by the people in which it was extremely difficult for the people to govern has been removed." But these agencies of democracy also he is constrained to dismiss (though with evident regret) as failing to accomplish their intended purpose, and as already passing into the penumbra of at least a partial eclipse.

So that, if the people are really to rule, and the plans for making the will of the majority invariably and promptly effective have all more or less completely broken down, Professor Elliott sees no remedy except in the decided simplification of government, but in this he does find hope. "If democracy means the rule of the majority, and if it be admitted that the present problem is to find a form of government which shall be efficient for the increased burden constantly placed upon it, and easily and quickly responsive to the popular will and truly responsible to the people for its acts, then a simplification either of life or of government is necessary. It is beyond the reach of possibility that life will grow more simple; on the contrary we may anticipate a constantly increasing complexity which will steadily enlarge the field of government action.

It is but fair to Professor Elliott to add that his book is written throughout with great candor and sincerity. It shows a commendably moderate, fair, and reasonable tone and temper. It exhibits the concern of a good citizen over the alleged failure of representative government, not in any line the bigotry of a partisan.



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By THE NATIONAL ASSOCIATION FOR CONSTITUTIONAL GOVERNMENT

The National Association for Constitutional Government was formed for the purpose of preserving the representative institutions established by the founders of the Republic and of maintaining the guarantees embodied in the Constitution of the United States. The specific objects of the Association are:

1. To oppose the tendency towards class legislation, the unnecessary extension of public functions, the costly and dangerous multiplication of public offices, the exploitation of private wealth by political agencies, and its distribution for class or sectional advantage.

2. To condemn the oppression of business enterprise,—the vitalizing energy without which national prosperity is impossible; the introduction into our legal system of ideas which past experience has tested and repudiated, such as the Initiative, the Compulsory Referendum, and the Recall, in place of the constitutional system; the frequent and radical alteration of the fundamental law, especially by mere majorities; and schemes of governmental change in general subversive of our republican form of political organization.

3. To assist in the dissemination of knowledge regarding theories of government and their practical effects; in extending a comprehension of the distinctive principles upon which our political institutions are founded; and in creating a higher type of American patriotism through loyalty to those principles.

4. To study the defects in the administration of law and the means by which social justice and efficiency may be more promptly and certainly realized in harmony with the distinctive principles upon which our government is based.

5. To preserve the integrity and authority of our courts; respect for and obedience to the law, as the only security for life, liberty, and property; and above all, the permanence of the principle that this Republic is "a government of laws and not of men."

The Initiative and Referendum; A Problem for Massachusetts and the Union

By Frank W. Grinnell
Of the Boston Bar

THE EDITOR OF THE CONSTITUTIONAL REVIEW has asked me for a discussion of the national aspect of the contest over the initiative and referendum in Massachusetts, and I am glad to contribute what little I can to the discussion of the subject for the information of those interested. I should say first, however, that my interest in the subject is purely that of an individual citizen, and that my source of information is personal observation from the gallery of the Massachusetts constitutional convention, as I felt sufficiently interested to sit through every session of that convention (with the exception of a day and a half) from June 6, 1917, when it met, until November 28, 1917, when it adjourned. I heard, therefore, practically everything which was said on the floor of the convention. I have also compiled clippings from all the newspapers of the state, relating to the constitutional convention and its doings, from November, 1916, when the people voted in favor of the convention, to date. While I do not pretend to have read everything that has been written on the subject, I have read a good deal that has been written on both sides of the question both in the newspapers and in books. The views expressed in this article are submitted for what they are worth as a result of the observation, study, and reflection thus indicated, in order that certain phases of this controversy may be stated and

fairly considered by men on both sides.

1. *The Campaign for a National System of Initiative and Referendum.* The floor leader of the initiative and referendum forces in the debate in the Massachusetts constitutional convention was Hon. Joseph Walker, the chairman of the committee on the initiative and referendum of the "Union for a Progressive Constitution," and formerly Speaker of the House of Representatives. With him on the committee of fifteen, the majority of whom framed the measure debated, was Sherman L. Whipple, Esq., and Mr. Whipple made one of the leading speeches in the debate on the floor in favor of the measure. Mr. Whipple is a well-known lawyer in Boston, and is doubtless known to many of the readers of the REVIEW as counsel for the congressional committee which conducted the so-called "leak" investigation in Washington. He was nominated for the presidency of the convention by Ex-Governor Walsh, who, with Mr. Walker, is one of the leading advocates of the initiative and referendum in the state, and his nomination was seconded by Mr. Walker. These circumstances are mentioned for the purpose of indicating the position which Mr. Whipple held in the initiative and referendum ranks when the convention met, and as a preface to the public statement made by him later, which will furnish perhaps the best in-

roduction to this discussion. Mr. Whipple deserves the thanks of the community for the frankness of the statement about to be quoted. He was, I think, the only leading supporter of the initiative and referendum cause in the convention who was frank enough to state, either during the campaign or during the sittings of the convention, that he believed in introducing the initiative and referendum into the national Constitution as well as into that of the state. Having listened to the entire debate, I do not remember a single suggestion on the floor of the convention of a proposal to insert the same machinery in the Constitution of the United States. Even Mr. Whipple's statement was not made on the floor of the convention; but on October 25 he addressed the Ford Hall Forum, and he was quoted in the *Boston Advertiser* the next morning as follows: "Responding to a question, Mr. Whipple expressed the hope that the initiative and referendum would be passed here and that it would be taken into the United States Constitution. He said he believed that it is more needed there than here; that the people at large should have a right to express themselves, and expressed confidence that, given the opportunity, they would have voted to enter on the present war." Emphasis is laid upon this utterance of Mr. Whipple not because it is a new suggestion, for there is a perfectly well-known movement on foot to bring about the national plan. At the hearing before the committee of the convention on the initiative and referendum, Professor Lewis J. Johnson, one of the leading supporters of the initiative and

referendum, was asked by a member of the committee whether he believed in extending the measure to the national Constitution, and made the somewhat qualified answer that in principle there was no reason why it should not be so extended, but that he preferred to begin with the states.

While the suggestion is not new, therefore, yet the significant fact is that it was not mentioned or featured in any way upon the floor or in the speeches which appeared in the public press during the campaign for the convention. This fact is significant because, so far as my personal observation goes, many people, if they have thought about the initiative and referendum at all, have thought of it only as a state question, whether they are supporters or opponents of the measure. The question is generally discussed thus far as a state measure, and as the suggestion of it as a national measure appears only in a limited number of newspapers or other publications from time to time, the significance of this aspect of it has not attracted the general attention which it deserves.

It is my object to present the matter as a practical national question, which cannot be ignored if we are even to attempt to carry out the theory upon which the initiative and referendum itself is urged, which is that we should be an informed democracy. The way in which the waves of national prohibition and of woman suffrage have gradually rolled up, as the result of a procession of states, until they reached the form of proposed specific amendments to the national Constitution, is a

sufficient illustration of the fact that whether we think we are in favor of or against the initiative and referendum we should try to look all the facts in the face before finally making up our minds. As is pointed out by Mr. Walter Lippmann, one of the most interesting and intellectually honest of the younger modern "progressive" American writers on the problems of democracy, we have passed through the era of abusive "progressive" criticism and have reached the time when constructive criticism and suggestion are required. It is fair to say that the Progressives of 1912, while they did not succeed in winning the specific political party victory which they attempted, did succeed in driving every institution of government with its back against the wall to meet the challenge of facts and defend itself in the minds of the American people with such force of conviction as its inherent soundness or weakness furnishes. Colonel Roosevelt and his followers startled the American people into thinking more seriously about their government than they had done at any time since the Civil War. Not since the formative period in the last quarter of the eighteenth century have ideas been in solution to the extent that they are today; and as the campaign of 1912 marked about the end of the preliminary stage of criticism, the coming of the war marks the beginning of the era when constructive thinking is essential. I believe the condition to be on the whole a healthy one, and this discussion is intended to be distinctly optimistic and cheerful.

Those who have followed the literature and discussion in regard to the initiative and referendum, as well as those who have heard the subject discussed orally, will agree, I think, that most of the discussions of the subject, even by the leaders on both sides, are intellectually dull because of the fact that most of them have a conventional character. This is as true of the so-called "progressive" utterances as of those of the so-called "conservatives;" for since 1912 a conventional vocabulary of "phrase and fable" has developed in the political speeches, which is already as hackneyed on the radical or "progressive" side as on the side of those called "stand-pat reactionaries." The critical and discriminating study of facts is noticeably absent in much of the writing and speaking on both sides, even by very able men. This is not true, however, of Mr. Lippmann, who has already been mentioned and whose books will be again referred to. His searching and discriminating words are suggestive and valuable as a basis for this discussion. Whether or not they agree with all that he says, men who are looking for a better sense of perspective in regard to future problems of the state and nation, whether their instincts are radical or conservative, or, as in the case of most of us, a mixture of both, will find readable and suggestive his books entitled "A Preface to Politics," "Drift and Mastery," and "The Stakes of Diplomacy." In the introduction to "Drift and Mastery," Mr. Lippmann says: "The battle, for us, does not lie against crusted prejudice, but against the chaos of a new freedom. This chaos is our

real problem. So, if the younger critics are to meet the issues of their generation, they must give their attention not so much to the evils of authority, as to the weaknesses of democracy." He says further: "A nation of uncritical drifters can change only the form of tyranny; for, like Christian's sword, democracy is a weapon in the hands of those who have the courage and the skill to wield it; in all others it is a rusty piece of junk. The issues that we face are very different from those of the last century and a half. The difference, I think, might be summed up roughly this way; those who went before inherited a conservatism and overthrew it; we inherit freedom and have to use it. . . . Americans can carry through their purposes when they have them. If the standpatter is still powerful amongst us, it is because we have not learned to use our power and direct it to fruitful ends. The American conservative, it seems to me, fills the vacuum where democratic purpose should be. . . . The conservatives are more lonely than the pioneers, for almost any prophet today can have disciples." And after advising the "younger critics" to study the weaknesses of democracy in the passage quoted, he goes on to say: "But how is a man to go about doing such a task? He faces an enormously complicated world, full of stirring and confusion and ferment. He hears of movements and agitations, criticisms and reforms, knows people who are devoted to 'causes,' feels angry or hopeful at different times, goes to meetings, reads radical books, and accumulates a sense of uneasiness and pending change. He

can't, however, live with any meaning unless he formulates for himself a vision of what is to come out of the unrest." He then explains that his book is an attempt to "sketch such a vision" for himself, and continues: "This doesn't mean the constructing of Utopias. The kind of vision which will be fruitful to democratic life is one that is made out of latent promise in the actual world. There is a future contained in the trust and the union, the new status of women, and the moral texture of democracy." These passages have been quoted in order to approach the discussion of a practical question in an atmosphere which is free and fair and in sympathy with the aspirations of the younger generation of American thinkers, among whom Mr. Lippmann is a distinguished figure. With this introduction let us consider the facts as to the development both of form and substance of the plan presented to the voters of Massachusetts, the substance of which Mr. Whipple believes should be inserted in the Constitution of the United States. Does it meet Mr. Lippmann's call for a "constructive" suggestion for use in the "battle against the chaos of a new freedom," or is it what he calls a "rusty piece of junk?"

2. *The Question to be Decided by the People of Massachusetts.* At the state election on November 5, 1918, the voters will find upon the ballot the following: "Shall the Article of Amendment relative to the establishment of the popular initiative and referendum and the legislative initiative of specific amendments of the Constitu-

tion, submitted by the Constitutional Convention, be approved and ratified?" This question they will be invited to answer by marking a cross opposite the printed words "Yes" or "No" on the ballot. Nothing else relating to this matter will appear upon the ballot, but probably at some time during the month or two before the election a pamphlet will be mailed by the Secretary of the Commonwealth to each registered voter in the state, containing the fifteen pages of printed details showing what is the article of amendment which is thus referred to in the brief question above quoted. When they receive this pamphlet the voters can read its fifteen pages if they want to, they can digest them if they take the trouble to do so, and remember the details if they can when they get into the voting booth and decide which way they will vote. The provisions of this proposed amendment were printed in a number of newspapers last fall, at the close of the session of the convention, and possibly some voters may have read it then. It would be interesting to know how many of them really did read it, and if they read it, how many really understood and now remember the practical details of the plan.

The debate over this amendment in the convention lasted about five months, and the last roll call in regard to it was on the question of passing the resolution to be engrossed, on November 27, 1917. That roll call showed 163 in the affirmative and 125 in the negative, out of a total of 320 elected members of the convention, two of whom had died prior to that time.

Of the 318 representatives of the people, therefore, who were entitled to vote upon the question in the convention, the recorded majority in its favor, of those voting, was 38, 30 members being absent and not recorded at this stage, several of them being too ill to attend that session. At the time the convention met, in June, the supporters of the initiative and referendum claimed that 190 members out of 320 were pledged in favor of such a measure, as the result of some form of campaign statement made in answer to written letters from the Union for a Progressive Constitution, or otherwise. It was claimed that these men were pledged in advance, regardless of argument or anything which they might learn as a result of the debate in the convention which was called for the purpose of deliberating and considering fairly the best interests of the state, and to advise the people deliberately and honestly what constitutional changes, if any, were called for by the practical needs of the state and its people, in the judgment of the delegates. It was common talk at the State House during the summer while the convention was sitting that many of the men who would finally vote in favor of the initiative and referendum proposal would do so merely because they had made some campaign promise or expression of opinion, although, after hearing the subject thoroughly discussed and the details formulated in the convention they did not personally believe that the proposed plan was a good one for the state to adopt. They voted to submit it to the people because they felt that they had pledged them-

selves to such submission whether they personally were in favor of it or not. Whatever may be said to the contrary, therefore, the vote of the constitutional convention by 163 to 125 does not mean that a majority of the members believed that this measure ought to be adopted by the people. It means that a majority of the convention felt bound to submit the measure to be voted on by the people. Accordingly, the problem of judgment as to whether it is really in the interest of the state to adopt this measure has been shifted to the shoulders of the registered voters, every one of whom, whether he likes it or not, has thus been made a member of the constitutional convention from now until November 5, 1918. This means that it is the duty of the registered voters of the state to consider the proposal in detail on its merits as a matter of judgment and common sense with as much care as they would give to an important question in their own private business, for the decision of this question will ultimately affect the private business and interests of every man, woman, and child in the state.

While this measure is a fundamental change in the scheme of government under which the commonwealth was formed and has developed, most men who are busy with their own affairs and with the war problems have not the time to consider the historical questions connected with it, and however interesting those historical questions may be to many men, the problem will be here stated and discussed as a practical business question, to be considered by practical men, whether they know anything about the history of it or not.

The present system, which is described as "representative government," is, as everybody knows, a system in which there is a legislature composed of representatives of the people from all parts of the state, who, in Massachusetts, are elected annually, to consider, discuss, and deliberate upon the needs of the state and its people and to pass such laws as seem to them wise. They accept the responsibility under oath to give their best efforts and judgment to the interests of the state and of its people as a whole. They also have the power under the forty-second amendment to the constitution to offer questions to the people at the polls if they see fit to do so, and as every voter knows who has found some of the questions upon the ballot in his voting booth, this is done from time to time. As the legislature is elected every year, any member can be retired if his constituents do not want to re-elect him. The supporters of the plan for the initiative and referendum insist in their speeches and writings that the I. & R. (as it is familiarly called) is not intended to weaken, but to supplement and strengthen, the representative government, by "bringing the government closer to the people" in regard to important measures. They say that it is intended to, and will, operate to bring representative government more within the original principle of a government "of the people, by the people, and for the people." They assert that representative government, as shown by the working of the present legislative system in Massachusetts as well as elsewhere, has failed to carry out that principle as fully as it should. They say

that the initiative and referendum has worked successfully in Switzerland, and that the experiments with it in Oregon, California, and other states have also been successful and have brought the government closer to the people, and that we should therefore adopt it in Massachusetts. In regard to Switzerland, Oregon, California, and other states where they have made experiments of this kind, there are great differences of opinion. Reputable men on both sides of the question express very different views as to the working of the measure in those places. But in the present discussion the experiments in other states will not be gone into, for the same reason expressed as to the historical question; namely, that most men do not and will not know much of anything about what happens in Oregon or California or Switzerland except what somebody tells them, and that may be accurate or it may be inaccurate.

The present discussion, therefore, will be confined to a practical examination of the details of the plan which the constitutional convention has submitted for Massachusetts, so that men can apply their "horse sense" to that plan, whether they know anything about history, Switzerland, Oregon, California or not, for in the end the problems of government in Massachusetts have got to be settled by the hard sense of the people of Massachusetts in the face of practical conditions as they exist and their knowledge of the way in which men act and will act in this state. While Massachusetts men are glad to learn about other parts of

the country, they have not been in the habit of copying other people's experiments without applying their own judgment to them; and we are asked to adopt this measure for Massachusetts and not for some other place. Now what is it that Mr. Walker, Ex-Governor Walsh, and the other supporters of the initiative and referendum want us to do?

3. *The Initiative and Referendum Plan Stated.* The proposed amendment begins as follows: "1. Definition. Legislative power shall continue to be vested in the General Court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws enacted by the General Court, to the people for their ratification or rejection." After these introductory words the details of the machinery for the initiative are stated substantially as follows:

4. *The Machinery of the Initiative.* Any ten registered voters in the state, if they wish to start the machinery of the initiative, can draw a proposed constitutional amendment or a proposed law, and after signing it they must submit it to the Attorney General, and if he shall certify that the measure is in proper form for submission to the people, then it may be filed with the Secretary of the Commonwealth. The latter officer will then provide blanks for subsequent signatures, and shall print at the top of each blank "a de-

scription of the proposed measure as such description will appear on the ballot," together with the names and residences of the first ten signers. The full text of the proposed constitutional amendment or law will appear only on the original petition signed by the first ten signers. It will not appear upon the blanks which are to be used to collect signatures in its support. Only "a description" of the proposed law or constitutional amendment will appear at the head of these blanks. The exact wording of this description, which is to go not only at the head of the blanks on which signatures are collected, but also upon the ballot when the question is eventually submitted to the people, is to be determined not by the ten signers, but by the Attorney General. Accordingly, the Attorney General for the time being is made a little legislature all by himself, to have the ultimate decision, "subject to such provision as may be made by law," as to the wording of the only part of the proposed law or constitutional amendment which will ever be read by most of the men who sign the petitions or who vote upon the questions in the voting booth. The legislature, consisting of elected representatives from all parts of the state, can do nothing but make suggestions as to the wording of this description. Nobody in the state except the Attorney General has authority to alter a word. They can make suggestions, but he is given the constitutional power to "determine" the matter. And he must determine it in the midst of all his other public duties when the petition is first presented to him by the first ten signers, although it may not be submitted

to the people for a year or two afterward. Section 3 says flatly that the blanks upon which signatures are originally collected must have at the top of each blank "a description of the proposed measure as such description *will* appear upon the ballot." When that description is once made it can never be changed or amended by anybody, either by the ten signers, the legislature, or even the Attorney General himself, even though the measure which it is supposed to describe may be changed. It must be decided once and for all before the original petition is filed and before there has been any discussion of the measure or its real objects.

This fact should be constantly borne in mind, because it shows clearly that the practical operation of the plan is intended to operate and will operate as a government of law-making by "descriptions" determined by one man, and that in some ways this provision will make the Attorney General the most powerful political officer in the state, with more practical power than all the rest of the state government put together. If the Attorney General should attempt to change his original description before it went on the ballot a new kind of constitutional question would arise with all its uncertainties until the Court passed on it.

When the blanks are thus prepared, the first ten signers can take them out and circulate them just as nomination papers are circulated today for candidates for office in order to get signatures. The original petition must be filed, as already explained, before the first Wednesday of September, and all

the required signatures must be filed not later than the first Wednesday of the following December. In the case of a proposed constitutional amendment, the signatures of 25,000 qualified voters must be obtained upon the blanks thus circulated. In the case of a proposed law, 20,000 signatures must be obtained upon such blanks. Not more than one-fourth of the signatures thus obtained shall come from any one county, but it is not necessary to get signatures from more than four counties if enough people are found in four counties to make up the required number. For instance, if one-quarter of 20,000 signatures for a law, or 25,000 signatures for a constitutional amendment, can be collected in each of the four eastern counties of Suffolk, Middlesex, Essex, and Norfolk, it will not be necessary to go outside of those counties. This is interesting to the rest of the state. It is especially interesting as the Constitutional Convention of 1779-80 which framed the Massachusetts Constitution was called largely because of the fact that the men in the extreme western county of Berkshire refused to recognize the state government as legal, or to allow any state courts to sit in the county until a constitutional compact was adopted on which they could rely to protect them against the eastern counties. They feared the eastern counties as they feared King George Third, and they wanted to restrain what they described as "the seeds of tyranny deeply implanted" in "every man by nature" (see Smith's History of Pittsfield, Vol. 1, Chaps. XVIII to XX). It will be interesting to see whether men in the

counties west of Worcester today believe that human nature has so changed in the eastern counties since 1780 that they can safely grant to men in those counties as much power as is provided by this I. & R. plan.

When the signatures are collected, they are filed in the office of the Secretary of State, and the signatures are to be examined and certified as in the case of nomination papers. Paid canvassers may be employed to collect signatures, and this cannot be prevented by the legislature. It is merely given power to "provide by law that no co-partnership or corporation shall undertake for hire or reward to circulate petitions." And the legislature may also "require individuals who circulate petitions for hire or reward to be licensed, and may make other reasonable requirements to prevent abuses arising from the circulation of petitions for hire or reward."

After the papers are signed and filed and certified, the proposed measure is referred to the legislature for discussion, and it would be printed like any other proposed bill under the present system and referred to a committee of the legislature, which would then hear the petitioners and all parties interested who might appear at the hearing, and the committee is then to report to the legislature with its "recommendations and the reasons therefor in writing. Majority and minority reports shall be signed by the members of said committee." In the case of a constitutional amendment, this report upon it will then go before a joint session of the Senate and House of Representatives, at which the president of the Senate

shall preside, and may be debated there. It cannot be amended, however, in any particular by the legislature at any stage except by a vote of three-fourths of the members of this joint session of the two houses. The final vote upon the measure in the joint session is to be taken only by call of the yeas and nays, and if upon such final vote the proposal receives a favorable vote of one-fourth of all the members elected to the legislature, it shall be referred to the next legislature, and the same process of discussion will then be followed, and upon the final vote, if it again receives the support of one-fourth of all the members elected, in a joint session of both houses, it goes automatically on to the ballot to be voted upon at the next state election.

The practical meaning of this is that a measure thus initiated by signature blanks containing only a "description" or title, the wording of which is finally determined at the beginning, must be submitted upon the ballot to the people two years later, without the possibility of changing a word in the "description," if 25 per cent of all the members elected to the legislature vote in favor of thus submitting it to the people in two successive years. While the description or title cannot be changed in any particular, the substance of the measure can only be changed by a three-fourths vote of the members of the legislature, although the whole question of submitting the matter to the people can be decided by one-fourth of the members elected to the legislature, thus establishing for the first time in Massachusetts a new experiment in

minority control of a legislative body. This minority control idea was accepted by the I. & R. men in the convention professedly as a so-called "conservative" check on the working of the initiative; but the *Boston American*, the most vigorous newspaper advocate of the I. & R., announced editorially, the day after this plan was substituted in the convention, that the I. & R. men accepted it (together with a reduction of the required signatures from 50,000 to 25,000) because they considered that it would be easier to get the support of one-fourth of a joint session of the legislature than it would be to collect 25,000 additional signatures. Of course it is obvious that with a carefully planned dramatic political campaign, more than one-fourth of the legislature (61 out of 240 members) under skillful handling, could be elected, pledged in advance to pass on particular measures to the people and to block every attempt to amend such measures. The way in which many delegates to the constitutional convention itself were skillfully persuaded to pledge themselves in advance, and the dramatic system of newspaper terrorism and political pressure which was resorted to to control their judgment after they became members of the convention, is a particularly interesting example of how the thing may be done. In this connection it should be remembered that the original petitions with the first ten signatures are to be filed before the first Wednesday in September. The significance of this is, among other things, that some organized group can get together before the first Wednesday of September and start their cam-

paing for a particular measure by filing it in the State House, and at the same time that they are circulating the signature papers they can conduct their campaign of political pledging before the primaries, and after the primaries they can continue with the same campaign up to the time of election. The proposed system is so devised that the state is obliged through the Secretary of the Commonwealth, to print and distribute the signature blanks and thus make of itself a powerful advertising medium for political purposes for every plan that any skillful political group may wish to circulate. The fact that these measures are to be printed upon state blanks, doubtless having a somewhat official appearance, can in itself be made use of as an argument to secure signatures from some people by skillful and persuasive canvassers. Many people think any paper with an official appearance is all right. Whether this is a desirable system to provide for is for the voters to consider. Whatever they may decide about that, it is desirable that we should look the facts squarely in the face beforehand, whatever effect they may produce on our judgment.

Thus far this statement has dealt mainly with the machinery of proposed constitutional amendments. If a law is proposed, instead of a constitutional amendment, the proposed law does not go before a joint session of the legislature, but is to be voted on by yeas and nays in both houses before the first Wednesday in June of the session in which it is proposed, and if it is not passed by both houses, then, if 5,000

additional signatures are obtained after the first Wednesday of June and filed between the first Wednesday of July and the first Wednesday of August, the act, as proposed by the initiative petition, goes automatically on the ballot at the next state election, and "if approved by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such law, it shall become a law." It is also provided that if the legislature fails to pass such law before the first Wednesday in June, "a majority of the first ten signers of the initiative petition therefor shall have the right to amend the measure which is the subject of such petition," provided that the Attorney General certifies "to the effect that the amendment made by such proposers is in his opinion perfecting in its nature and does not materially change the substance of the measure." An amendment so made shall not invalidate any signature attached to the petition. In other words, six of the first ten signers of any such petition are given the right to change the wording of the proposed law over the signatures of the 20,000 petitioners without consulting those signers, although the entire legislature of Massachusetts, elected to represent people from all parts of the state, cannot amend the proposed law by a single word or comma. This provision differs from that already explained for amending a proposed constitutional amendment by three-fourths of a joint session. The first ten signers, therefore, are made into a little self-constituted legislature all by themselves, subject to

a slight check or supervision by the Attorney General, who is another little legislature all by himself, and if the Attorney General for the time being, who is elected every year, happens to take a loose view of his functions, he can obviously certify that pretty far-reaching changes are "perfecting" in their nature and "do not materially change the substance of the measure," and then it may be necessary to wait until the question comes up in some case before the Supreme Court before we can find out whether or not the change approved by him was really within his power to approve or was really a substantial change in the measure. This seems likely not only to add to the burden of the courts in passing upon the constitutionality of such legislation, but also to add to the uncertainty of the law, because of the existence of such questions of procedure which are to be made into constitutional tests, in addition to the constitutional tests which already exist. Here again is a question of judgment for the voters, and the facts should be faced squarely.

The plan also contains the following: "Article VI. Conflicting and Alternative Measures. If in any judicial proceedings, provisions of constitutional amendments or of laws approved by the people at the same election are held to be in conflict, then the provisions contained in the measure that received the largest number of affirmative votes at such election shall govern. A constitutional amendment approved at any election shall govern any law approved at the same election. The General Court, by resolution passed as herein-

before set forth, may provide for grouping and designating upon the ballot as conflicting measures or as alternative measures, only one of which is to be adopted, any two or more proposed constitutional amendments or laws which have been or may be passed or qualified for submission to the people at any one election: Provided, that a proposed constitutional amendment and a proposed law shall not be so grouped, and that the ballot shall afford an opportunity to the voter to vote for each of the measures or for only one of the measures, as may be provided in said resolution, or against each of the measures so grouped as conflicting or as alternative. In case more than one of the measures so grouped shall receive the vote required for its approval as herein provided, only that one for which the largest affirmative vote was cast shall be deemed to be approved."

5. *The Machinery of the Referendum.* Thus far I have tried to state as briefly as possible the machinery of the initiative. The machinery of the referendum is as follows: No law passed by the legislature shall take effect for ninety days except laws declared to be "emergency laws." If the legislature decides that a law is an emergency law, such law must "contain a preamble setting forth the facts constituting the emergency" and must "contain the statement that such law is necessary for the immediate preservation of the public peace, health, safety, or convenience." A separate vote must be taken on the preamble by a roll call in the legislature, and unless the preamble is adopted by two-thirds of the

members of each house voting thereon the law shall not be an emergency law; "but if the Governor, at any time before the election at which it is to be submitted to the people on referendum, files with the Secretary of the Commonwealth a statement declaring that in his opinion it is an emergency law, and setting forth the facts constituting the emergency, then such law shall take effect; but no grant of any franchise or amendment thereof or renewal or extension thereof for more than one year shall be declared to be an emergency law." The method of securing a referendum upon a law which is not an emergency law is to file a petition signed by ten voters not later than thirty days after the law that is the subject of the petition "has become a law." The Secretary of the Commonwealth then provides blanks bearing at the top of each blank a description of the proposed law "as such description *will* appear upon the ballot," and this description, like those on initiative blanks, must be determined by the Attorney General before the blanks are issued and cannot be changed by anyone after that time. If 15,000 signatures are then obtained and filed not later than ninety days "after the law has become a law" and duly certified, then the operation of such law shall be suspended, and the question goes automatically upon the ballot at the next state election, and if approved by a majority of those voting upon the question it becomes a law, "but no such law shall be held to be disapproved if the negative vote is less than thirty per cent of the total number of ballots cast at such state election."

6. *Excluded Matters.* The foregoing statement shows the machinery which is meant when the words "initiative and referendum" are used in the discussion of the question before the people between now and next November. There are certain other details of a minor character which do not seriously affect the general plan above stated, except the following sections excluding certain matters from the operation of the initiative machinery and certain other matters from the operation of the referendum machinery.

7. *Matters Excluded from the Initiative Machinery.* "Section 2. Excluded Matters. No measure that relates to religion, religious practices, or religious institutions; or to the appointment, qualification, tenure, removal, recall, or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation, or abolition of courts; or the operation of which is restricted to a particular town, city, or other political division or to particular districts or localities of the Commonwealth; or that makes a specific appropriation of money from the treasury of the Commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the General Court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect. Neither the eighteenth amendment of the Constitution, as approved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative

amendment. No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail, and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly. No part of the Constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition, nor shall this section be the subject of such a petition. The limitations on the legislative power of the General Court in the Constitution shall extend to the legislative power of the people as exercised hereunder."

8. *Matters Excluded from the Referendum Machinery.* "No law that relates to religion, religious practices, or religious institutions; or to the appointment, qualification, tenure, removal, or compensation of judges; or to the powers, creation, or abolition of courts; or the operation of which is restricted to a particular town, city, or other political division or to particular districts or localities of the Commonwealth; or that appropriates money for the current or ordinary expenses of the Commonwealth or for any of its departments, boards, commissions, or institutions, shall be the subject of a referendum petition."

9. *General Discussion.* Do the people of Massachusetts and of the United States believe that these complicated arrangements, placing the political power in the hands of ten private citizens who can collect signatures through paid canvassers and with the assistance of powerful organized groups, perhaps, log-roll for signatures by circulating petitions for different measures at the same time or through some other indirect method, will in the long run work practically as more of a "government of the people by the people and for the people" than we have now under our legislative system? Since men of all parties like to use the name of Abraham Lincoln in support of every variety of measure which they may be advocating, let us ask ourselves whether Abraham Lincoln, with his strong common sense and knowledge of men, would ever have put up such a proposition to the people as a plan of American government? Lincoln immortalized the saying that "you can fool some of the people all of the time, and all of the people some of the time, but you cannot fool all of the people all of the time." If he were here today and were asked his opinion of this measure, is it not probable that he would answer by simply reminding us of the fact that he forgot to say, in his immortal statement, that you can also fool more of the people more of the time? (In connection with the attempt of leaders of all parties and supporters of all kinds of plans to claim the name of Abraham Lincoln as an advertisement for their plans, attention is called to the following passage from Mr. Walter Lippmann's book, "A Pref-

ace to Politics" (pp. 165, 166). As already remarked, Mr. Lippmann cannot be classed as a reactionary. He says: "You hear it said that the initiative and referendum are a return to the New England town meeting. That is supposed to be an argument for direct legislation. But surely the analogy is superficial, the difference profound. The infinitely greater complexity of legislation today, the vast confusion in the aims of the voting population, produce a difference of so great a degree that it amounts to a difference in kind. The naturalist may classify the dog and the fox, the house-cat and the tiger together for certain purposes. The historian of political forms may see in the town meeting a forerunner of direct legislation. But no housewife dare classify the cat and the tiger, the dog and the fox, as the same kind of animal. And no statesman can argue the virtues of the referendum from the successes of the town meeting. But the propagandists do it nevertheless, and their propaganda thrives upon it. The reason is simple. The town meeting is an obviously respectable institution, glorified by all the reverence men give to the dead. It has acquired the seal of an admired past, and any proposal that can borrow that seal can borrow that reverence, too. A name trails behind it an army of associations. That army will fight in any cause that bears the name. So the reformers of California, the Lorimerites of Chicago, and the Barnes Republicans of Albany all use the name of Lincoln for their political associations. In the struggle that preceded the Republican convention of 1912, it was ru-

mored that the Taft reactionaries would put forward Lincoln's son as chairman of the convention in order to counteract Roosevelt's claim that he stood in Lincoln's shoes.")

The words "representative government" have been so commonly used in a general way in these discussions in the last few years that they have a stale sound to many men and make no impression on their minds. But Delegate Balch, in the debate in the Massachusetts constitutional convention, put his finger on the real back-ground of our present system when he spoke of the necessity of "deliberative" government. And it is because in the government of a great state, and particularly a great industrial state like Massachusetts, we need deliberation and calm, thoughtful, and discriminating judgment in the matter of legislation, that it will make matters clearer in the coming debates of this campaign if the words "deliberative government" are used instead of "representative government."

As already pointed out, Mr. Walker, Ex-Governor Walsh, and other I. & R. leaders maintain that their plan will bring the government closer to the people, and will make "the people" rule more clearly, and will result on the whole in a better administration of the affairs of the state in the interest of the whole people through the working of this machinery to obtain the "rule of the majority at the polls." It is easy to talk in such general terms about these matters. The general picture of a free people governing itself by a majority vote of all its citizens, guided solely by the ideals of justice, lends it-

self easily to eloquent oratory. But the practical operation of the machinery, as Mr. Walker, Ex-Governor Walsh, and others see it in their own minds, back of their oratory, is shown very clearly by the following extract from the debate in the convention. That debate will probably be printed soon in a separate volume and will cover 1,200 pages or more. Comparatively few men will be able to read it all or any of it. But having myself heard the entire debate from the gallery as a spectator, I submit that the following quotations show the picture of the practical working of the machinery more clearly than all the rest of the debate put together.

10. Extract from Debate in the Massachusetts Constitutional Convention, August 7, 1917.

Mr. Walker (of Brookline): "I tell you the only way to bring back the constitution and the courts and the legislature into the confidence of the people of this commonwealth is to allow the people to appeal from the decisions of the legislature to a majority of the voters when it seems to be necessary. And there is no reason why we should not allow the citizens, a substantial number of citizens, to appeal to all the citizens. * * * Now this petition matter is in the nature of a motion and seconding. That is the real nature of it. * * * We give the petitioners a chance to drop their petition if the General Court does anything that satisfies them, either in regard to a law or a constitutional amendment. They propose a law; the legislature discusses it and may find flaws in it and defects. If they are friendly to the principle, they will pass

a law that satisfies the petitioners, and that will have a great tendency to reduce the number of matters on the ballot, because I assume that when 20,000 or 40,000, as the case may be, citizens of this commonwealth come before the General Court and ask for a law or a constitutional amendment, the General Court is going to sit up and take notice. They are going to realize that there is a demand, and they are going to realize that this matter is going before the people if they do not act, and so they will give the matter their serious attention and consideration, and I believe that nine times out of ten they will solve the question and the matter will never get on the ballot."

Mr. Montague (of Boston): "I would like to ask the gentleman from Brookline if it is expected that these 20,000 or 40,000 signers of the petition will each understand what they are signing?"

Mr. Walker: "They will understand more or less about it; some of them will understand all about it, some of them understand very little about it. It is comparatively unimportant—comparatively unimportant whether they understand it or not. (Laughter.) I will elaborate that point in a minute."

Mr. Montague: "I understand—if I do not understand correctly I desire to be corrected—that it is the opinion of the gentleman from Brookline that it does not make much difference whether any substantial number of these signers do understand what they are signing."

Mr. Walker: "I made no such statement whatever. I said that it was comparatively unimportant—comparatively

to what? What is the important thing? When a man seconds a motion does he necessarily know all about the subject that is going to be discussed? Not necessarily. It is not of supreme importance that those who second a motion should understand clearly all the provisions. They know the main subject, and these petitioners will know in a general way the thing they are petitioning for. They will know the main thing they want. I do not suppose all of them—I do not believe all of them—will understand it in detail, but I contend they will know the general thing they are aiming at. But the essential thing is that the people shall understand it when they come to vote on it. That is the essential thing, and therefore after this petition has been signed then we provide that the thing shall be held in abeyance for two years in regard to a constitutional amendment, or one full year in regard to a law, taken to the legislature, delayed, talked over the commonwealth, literature sent, arguments pro and con. We do intend to see to it, so far as we can, that the citizens of this commonwealth be instructed before they are called upon to decide the question. And that is the only reason, Mr. Chairman, I say it is relatively unimportant how thoroughly those who sign the petition understand the matter.”

Mr. Montague: “I desire to ask the gentleman if he thinks that a petition signed by 40,000 or 100,000 people who did not know what they were signing ought to have any great influence on the legislature or anybody else.”

Mr. Walker: “I think that you can all answer that question about as well as I can. You send a petition up to the legislature with 50,000 signatures, and it does make an impression. I do not know how much impression it will make. Perhaps the gentleman can inform this body just how much impression it will make.”

Mr. Montague: “That was not my question. My question was whether a petition signed by 20,000 people or 40,000 people who did not know what they were signing ought to have and ought to make an impression on the legislature.”

Mr. Walker: “If the gentleman’s premise is right, that they did not know what they were signing, I should say that it would have no influence on the legislature, not the slightest; but I do not make a claim that they will not know what they were signing. He asked me whether they would read the measure and understand its provisions. No, not many of them. A good many of them will, perhaps, but not all of them by any means. But the fact will remain that they will know the general purpose of the petition, and before the vote is taken the people will know.”

Mr. Walsh (of Fitchburg): “I should like to ask the gentleman if, during his eight years’ experience in the legislature, it was the custom and practice for all the legislators to read the bills. Was not the practice in the legislature the same as it has been among the people, of following the leadership and direction of public men and leaders who read and study the bills?”

Mr. Walker: "I do not need to answer that question. Of course no man reads all the bills. A few of them read many of the bills, but we know the general substance of the bill before we vote on it, and we take, as I say, and follow to an extent the leadership of men, and if there are any jokers to be brought forth they are brought forth. The same would happen in regard to measures before the people. If the measure carried out the purpose, there would be nothing said about the particulars of the measure; its purpose would be debated. And if there was a joker in it, or if it was a defective bill in some particular, that would be pointed out quickly enough."

Mr. Washburn (of Worcester): "I desire to return for a moment to see if I correctly understand the answer of the gentleman from Brookline when he suggested that the 40,000-odd signers of the petition merely second the motion."

Mr. Walker: "That is it."

Mr. Washburn: "I am right, then, in my conclusion that a very small number of people are interested in the proposition proposed, and then the 40,000 individuals throughout the commonwealth without any knowledge second it by affixing their signatures?"

Mr. Walker: "I want to answer any questions that will be enlightening to members of this convention, but I am not going to answer questions that are put up to me for the purpose of getting offhand the reply which may or may not strengthen my argument. What is the use of asking me that question? We all know the situation. Sometimes

it will be the Chamber of Commerce in Boston that will want an amendment. They will get ten of their prominent members to sign it and they will file the petition; they will back it up and see that it is circulated. Sometimes it will be some real estate organization, or it will be some great civic body; sometimes it will be a labor organization; sometimes it will be a grange—various organizations. Sometimes it will be a group of reformers, and sometimes it will be an individual, perhaps, who conceives a great idea and gets 5,000 or 20,000 people to back it up. That is the situation; we all know it. I cannot throw any light upon the subject by answering that question. The fact is that, as a matter of form, some one has got to sign the thing and start it; that is all. And so I provide, as is necessary, of course, that a certain number of petitioners should sign. I do not care whether it is ten or a hundred. I said ten; it is quite immaterial whether it is ten or a hundred. Sometimes I have thought that a hundred would be better, because if there were a hundred names they could be scattered about over the State, and it would give a little more weight to the petition, because we would know what men stood back of it. Those names must appear upon every petition that is circulated, so we will know not only the measure but we will know the men who stand back of it. And if there are prominent men, men in whose judgment, whose probity, and whose public spirit we have confidence, it will help the petition. So I am not sure that it would not have been a good idea if we had said a hundred instead of

ten. But that is neither here nor there; ten is quite enough. They must sign it, and then they must get these signatures. I do not believe that after this measure has been worked for a while in the commonwealth and the people come to understand it, when they come to see further that there is a responsibility attaching to their signatures on these various papers, I do not believe they will sign them so easily as they now sign petitions."

Mr. Hale (of Boston): "I am still not quite clear in my mind as to the answer that the gentleman from Brookline gave to the gentleman from Boston (Mr. Montague). I would like to ask again whether I misunderstand his attitude. I understand from his answer and from the question that he means that not necessarily the great bulk—in other words, not necessarily all of the people who gave their signatures to this petition—will understand thoroughly all of the details of the measure proposed. Do I understand that, in addition to that, he means that the great bulk of the signers of the petition will not understand what the subject is about and will not be generally in favor of it?"

Mr. Walker: "I am glad the gentleman asked the question if there is any doubt about it. I tried to be perfectly explicit. I believe that practically all the signers, even though there are forty or fifty thousand of them, will know what they are about. They will know, most of them—at least there will be mighty few of them who will not know—what the thing is about. They will know what they are seeking

to attain. They simply will not know, perhaps, the details of the measure. Perhaps as these petitions are passed around they will not be adequately explained to them. But, Mr. Chairman, there is no other way of doing it. There is no other way of giving the people an opportunity to have the laws that they want. If anyone has a better suggestion to make, let him make it; I know of no other way."

11. *Comment on the Above Passage.*

It appears, therefore, that the real object and expectation of this plan of the initiative and referendum is to place in the hands of popular leaders like ex-Governor Walsh, Mr. Walker, and others, political power to persuade citizens, not to read and consider carefully the measures which they are to sign and vote upon, but, in the words of ex-Governor Walsh, to "follow the leadership and direction of public men and leaders who read and study the bills." This means in practice transferring the entire legislative and constitution-making power of the State from the elected representatives of the people all over the commonwealth to the persuasive power of private citizens who may be popular leaders with great powers of dramatic oratory, or who may be skillful political schemers playing for position as the representatives of highly organized and interested groups. At this point we should again remember the suggestion that it is always possible to "fool more of the people more of the time." Is such a system, which is to work in such a way as described by its own supporters, likely to result in a "deliberative"

government, which is essential to the sound development of a great modern state? May there not be such a thing as "groupocracy" masquerading under the name of democracy? It should also be remembered that Mr. Kales in his book on "Unpopular Government in the United States" has given us the word "politocracy."

12. *The Federal Aspect of the Question.* As this article is written to present the federal aspect of this campaign in Massachusetts, I quote again for convenient reference Mr. Whipple's statement with which I began, so that readers of the REVIEW, after reading the facts, may compare their own judgment with that of Mr. Whipple. "Responding to a question, Mr. Whipple expressed the hope that the I. & R. would be passed here and that it would be taken into the United States Constitution. He said he believed that it is more needed there than here; that the people at large should have a right to express themselves, and expressed confidence that, given the opportunity, they would have voted to enter on the present war."

Mr. Whipple is not alone in suggesting that this plan should be inserted in the United States Constitution. There is a well-organized movement on foot throughout the country for that purpose. It is essential, therefore, that the voters of Massachusetts and the people of other states should look at this matter not merely as a state question, but in view of this national movement which was briefly suggested by Mr. Whipple. As already stated, the gradual progress of the movements

for the federal amendments for prohibition and woman suffrage show how such movements grow as a result of a procession of states. The men who believe that we should have the initiative and referendum as a piece of national machinery, of course, want Massachusetts to join the procession because of the advertising value which the name of Massachusetts as a leader among the original thirteen states would give to their movement. We must consider, therefore, whether as a matter of practical judgment we want to commit Massachusetts to such a program that her name can be used for the purpose of breaking into the national constitution in this way. Or shall Massachusetts maintain her reputation for leadership by resisting this movement and trying to demonstrate to the rest of the country that it is not wise to subject the entire government of the United States to the operation of any such measure? Do we believe in setting up or helping to set up a piece of machinery for the national government by the operation of which every measure relating to the prosecution of a war or other serious and difficult problems can be interfered with by signature petitions circulated by German or hyphenated money or hostile pressure of some kind or other? Do we believe in setting up such a machine for the "ham-stringing" of the nation in emergencies?

Is it not clear that the "signature machine" which is proposed could be used by skillful men, whether in the state or throughout the nation (if it were adopted as a national plan), for

starting all sorts of sectional controversies? One reason why the original Constitution of the United States was adopted was to prevent the different states from cutting each other's throats by means of all sorts of sectional trade discriminations, etc. Where would Massachusetts and New England be if such a "signature machine" were placed in the hands of people from all parts of the country? Do the experiences of the past few years indicate anything very promising in that respect? How many varieties of campaign on different subjects could be tried against different parts of the nation?

In all the talk about laws and constitutions it is generally forgotten that there are certain sayings which have come up out of the thousands of years of experience of human life, so that they are known to all kinds of people everywhere in the world and are acted upon by them in their private affairs. These sayings, or proverbs, form part of the general knowledge of people in a way that no law or constitutional provision ever did or ever will. One of these sayings, which every one of us acts upon in his own private affairs, is that "what is everybody's business is nobody's business." This is the ultimate fact which is behind the practical necessity of deliberative government. There is no mystery about it. Like all big facts the foundations of government are simple. It is the reason why we have to have public business done by representatives who can deliberate. It is apparent that the I. & R. leaders recognize this fact, and that what they want to do is to place the power in

the hands of small groups of private citizens who act as leaders, so that these leaders can do the deliberating, and then after they have deliberated can have the political power of the machinery of the state to put the result of their deliberations into practical effect over the heads of the entire body of elected representatives from all parts of the state. That is the simple issue. Do we want to grant that power?

After reading the foregoing statement, do you think that the "description" of the proposed amendment which is to go upon the ballot next November is an honest "description," or that the "definition" of the initiative and referendum with which the proposed amendment begins, as quoted at the beginning of the statement, is an honest "definition" of what follows in the form of machinery for practical use? Would not an honest "description" of that machinery read something like this: "Resolution, to provide for establishing the right of ten voters to collect signatures to a petition for the passing of constitutional amendments or laws on blanks which contain only a description of such measures, and if, by the use of paid canvassers, they get enough signatures from four counties, to force their questions upon the ballot against the judgment of a majority of the legislators and at the expense of the state which is to pay all the bills for working the machinery which is placed in the hands of every ten men who can collect signatures?"

During the debate in the convention, one of the delegates who was a strong supporter of the I. & R. said that industrial conditions had developed just two

classes, the many, living in poverty and misery, and the few, living in wealth. Is that true as a matter of fact? Is it not true that the large majority of the people in the state and in the nation do not fall within either of these two classes? This question occurred to delegate Whittier of Winthrop at that point, and although it was the only speech that he made during the convention he rose and asked: "Where do I come in?" Then another member rose and asked the same question. Although Mr. Whittier did not say another word during the entire debate, that one question cuts deeper into the argument for the I. & R. than any other question that was asked during the entire debate. Delegate Underhill of Somerville made a strong argument against the I. & R. on the ground that it was unfair to the thousands of citizens of Massachusetts, men, women, and children, of small means, farmers, clerks, bookkeepers, widows, small storekeepers and persons in every variety of modest occupation—that great body of people who are and always will be unorganized and who never come near the State House except in the shape of those chosen representatives of all the people who have imagination and conscientious responsibility enough to remember their existence. They know comparatively little about

the details of government, but they have to bear the burden of the results, individually as well as collectively, just as much as any individual or body of persons who are commonly classified as "labor" or "capital." They have never expressed any interest in the I. & R., but their rights and interests are as sacred in the eyes of Massachusetts as those of anybody else, because they never are and never will be organized. They are in many ways politically weak as compared with highly organized groups of men and women. They need the protection of a system which calls for deliberative government.

Think it over, citizens of Massachusetts and of the United States. Is this "signature machine" going to be a square deal for the people as a whole if it is adopted? Never mind the history. Think it out for yourselves as level-headed men, and do not let anyone confuse you by high sounding oratory. Remember the practical machinery when any orator begins to talk about this subject in vague general terms. Remember that the orators cannot change the fact that "what is everybody's business is nobody's business" by creating a signature machine. Keep your eye on the machinery. Ask questions, and make the orators justify the practical details of the machinery.

The Constitution of Canada in a War-Time Election PART II.

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In detailing the causes for the occurrence of a general election in the winter of 1917, only the routine has so far been mentioned. The real cause lies very deep and is of very great significance.¹ Canada had sent 300,000 men overseas to take part in the great war for liberty and democracy. Her men were suffering terribly, many slain, more disabled. After a total enlistment of over 400,000, volunteers came in very slowly and hardly in sufficient numbers to make up for the casualties. Something had to be done if Canada was to continue her efforts on the same scale. The Prime Minister had been in England for over two months, having been invited with the prime ministers of the other "overseas dominions" to meet in London in conference with the British Cabinet in reference to matters connected with the prosecution of the war. He returned to Canada firmly convinced that the time had "come when the authority of the state should be invoked to provide reinforcements to sustain the gallant men at the front," and so informed the House of Commons, May 18, 1917, adding: "Early proposals will be made on the part of

the Government to provide by compulsory military enlistment on a selective basis such reinforcements as may be necessary to maintain the Canadian army in the field as one of the finest fighting units of the Empire, not less than 50,000 and probably 100,000." (House of Commons Debates, 1917, unrevised edition, pp. 1613, 1614.) Sir Wilfrid Laurier, the Leader of the Opposition, did not commit himself to this scheme, although he said: "Canada intends to remain in the war to the end until victory has been won." (Idem, p. 1618.)

The Military Service Act was introduced June 11. (Idem, p. 2277. This, as we shall see, was followed immediately by the resignation of Hon. Mr. Patenaude, one of the members of the Cabinet.) On the second reading, June 18, the Leader of the Opposition moved an amendment that the question should be determined by a referendum. (Idem, p. 2506.) The lines were drawn. It was generally (not universally) believed, at least in the English-speaking communities, that a referendum would probably be adverse to the scheme and in any case would cause irreparable delay. The Bill was de-

¹ In what follows I am not to be understood as expressing any opinion of the propriety or wisdom of any measure or of any party. Under our system, His Majesty's Justice is wholly removed from the realm of politics. By statute he has no vote, nor can he be a member of Parliament; by the etiquette of his position he is precluded from expressing an opinion on any contentious public matter however important. Appointed for life he can be removed only by the vote of both Houses of Parliament, and any interference on his part with political questions would be an invitation to Parliament to exercise its powers. Even when the lines were not so strictly drawn, an undue participation in affairs of politics caused the removal of two Justices of the Court of King's Bench in Upper Canada, Mr. Justice Thorpe in 1807, and Mr. Justice Willis in 1828.

bated almost daily and from day to day in the House or in Committee until July 24, when it reached its third reading and was passed, 102 to 44, with 11 pairs.

In the Senate, the Hon. Mr. Bostock, the Leader of the Opposition, moved an amendment that the Act should not come into effect until after the general election. This, after a long and animated debate, was negatived, 44 to 34, and the Bill received its second reading, 54 to 25. It passed rapidly through committee and received its third reading August 8, 1917. (Debates of the Senate, 1917, unrevised edition, pp. 371, 384 et seq., 411 et seq., 554.) The Royal assent was given August 29, and the Act became law. (Military Service Act, 1917, 7-8 Geo. V, c. 19, Canada.) While the Bill was under discussion in the Senate, it seemed doubtful whether the Government would have a majority there. But there were several vacancies in the membership, caused by death. The British North America Act (sec. 32) gives to the Governor General the power to fill all vacancies in the Senate "by summons to a fit and qualified person;" and the Government in the name of the Governor General gave a summons to a number of "fit and qualified" persons accordingly. One of the tests of fitness was of course deter-

mination to vote for the Bill. Those so appointed did vote as expected.

Immediately after the decision to introduce the Bill in the House of Commons, an incident occurred which passed almost without notice in Canada, but which will help to an understanding of our Constitution by those unacquainted with it. As I have said, the British North America Act says nothing of the Ministry, but everyone in Canada knows that the Ministry is a body of Members of Parliament brought together by the Prime Minister, who has the confidence and can command the majority of the votes of the House of Commons.² They are the "Government," the "Administration." While, so far as anything in the written constitution is concerned, the Ministers might be of all shades of opinion, and while by constitutional usage there is nothing to prevent the most violent controversy in the secrecy of the Council Chamber,³ still, in our constitutional practice, when a policy is decided upon, all conflict must cease and every member of the Administration must take the responsibility for it. There is no such thing as divided responsibility.⁴ If any Minister is not prepared to support with his whole heart and to stake his political future upon any proposed measure, he must resign.

² Those who are unacquainted with the system of "responsible government" and wish to know something of it are referred to my Dodge Lectures, "The Constitution of Canada," Yale University Press, 1917, at pp. 91, 92, 93, 94, 96, 121. As to the appointment of Senators, see pp. 66-69, 82, 83, 102, 103, 114, 123.

³ One very noted Canadian politician is alleged to have said: "We fight like blazes in Council." Whether he said it or not, the fact is notorious.

⁴ The Dodge Lectures, p. 96. An English Minister is reported to have said: "We must all hang together or hang separately." (Benjamin Franklin has been credited with the same remark—it has become a political commonplace; I have heard the late Sir John A. Macdonald use it). Matters are not quite so dangerous as that in Canada, but a house divided against itself cannot stand.

When it was determined to introduce the Bill for compulsory military service in the House, the Hon. Mr. Patenaude, Secretary of State, resigned his portfolio, as he was opposed to the Bill on principle. To understand Mr. Patenaude's position it will be necessary to say a word of the history of his party. It will be understood that I shall speak in generalities and without expressing an opinion, being concerned solely with the facts. When Sir Wilfrid Laurier was in power, he had for a time a brilliant group of young French Canadians as followers. By the participation of Canada in the South African war, the attention of Quebec was drawn to the fact that the sons of Canada might possibly be called upon to take part in wars in which Canada did not appear to have an immediate interest. A very considerable amount of dissatisfaction was manifested both in public and in private, at Canada's participation in that war; and when Sir Wilfrid in 1910 announced his policy of forming a Canadian navy as Canada's part in the defence of the Empire, there was an open break in Quebec. MM. Bourassa, Asselin, Lavergne and others formed the Nationalist party whose policy was "no participation in Imperial wars." The old Conservative (or Bleu) party almost disappeared, and the Province was practically all Liberal or Nationalist. In the election of 1911, the Nationalists joined hands with the Conservatives, who were opposed to Reciprocity with the United States; the Nationalists were concerned not so much to defeat Reciprocity as to drive from power their fellow French Canadian whom they

accused of betraying their race. He was too British for them—"anything to beat Laurier." The election resulted in a majority against Laurier, a majority of which an important part was the 27 Nationalist Members elected in Quebec. The new Prime Minister, Mr. (now Sir Robert) Borden, must needs recognize the Nationalists. While Bourassa, the chief leader (it is said) declined office, four of the Nationalists were called to the Cabinet. When the new Government announced the policy of helping Britain by paying for three Dreadnoughts, one of these, Hon. Mr. Monk, resigned, October 22, 1912. Some changes afterwards took place unnecessary here to go into, and on the outbreak of the war there were three Nationalists in the Ministry. They raised no objection to volunteers being sent from Canada; one of them indeed, M. Blondin, himself put on the King's uniform. Not a few Nationalists volunteered, at least one of the leaders, M. Asselin, amongst them. But when compulsory service was proposed, M. Patenaude could not approve and consequently resigned. MM. Blondin and Sevigny accepted the measure and remained in the Ministry. They were both defeated at the general election, in common with every other French Canadian in Quebec who supported conscription, and having no seat in Parliament they must resign on or before the meeting of Parliament (unless indeed they could be saved by the soldiers' vote, not then counted; when these votes were counted later it was found that both were defeated and they have resigned).

During the whole summer of 1917, and almost from the beginning of the war, there was an agitation more or less active for a Coalition Government. The party system is thoroughly developed in Canada (see the Dodge Lectures, pp. 91-105) and for many years there have been two well-defined political parties; third parties have never thrived. That party which has the majority in the House of Commons must take the responsibility for all legislation and all acts of government. It is unconstitutional (in our sense of the word) for a Cabinet to be divided in opinion on public questions. The result is that all the Ministry must be of one political creed. But there is a precedent for a Ministry composed of members of both political parties. When it was thought that confederation of the British North American colonies would prove of advantage, the leaders of the two parties in Canada, Mr. (afterwards Sir) John A. Macdonald and Mr. George Brown joined hands and formed a Coalition Government to carry the scheme into effect. (See the Dodge Lectures, pp. 29, 115.)

The movement for a Coalition Government during the war secured scant attention from politicians at first; but when the proposal was made to have compulsory military service, it could not but be evident that both parties should share the onus. The Prime Minister asked Sir Wilfrid Laurier to join him in an administration, placing half the portfolios at his disposal; but this offer was predicated upon enforcing military service, and Sir Wilfrid declined. At some meetings of prominent members of the Liberal (Opposi-

tion) party, it looked as though Sir Wilfrid's attitude would be approved. Sir Robert Borden, however, did not lose heart. He entered into negotiations with leading members of the Liberal party, and ultimately a Coalition was formed and a Ministry sworn in composed of substantially the same number from each party. This was unconstitutional (in our sense) unless justified by the emergency, as to which there was and is much difference of opinion. However, the rupture of the Liberal party, which was made manifest in the House of Commons by many of the Liberal members voting against their former leader, Sir Wilfrid Laurier, on the question of extending the life of Parliament and more particularly on that of compulsory military service, was carried to its logical conclusion. Those Liberals who voted against Laurier did not cease to be Liberals; it would hardly have been possible for them, remaining Liberals, to support a Conservative Administration; and a logical solution was found in the formation of a Coalition Government.

Another preparation for the general election was considered to be the voters' list, that is, a decision as to who should vote. By the British North America Act, section 41, the Parliament of Canada has the power to fix the qualifications of voters, but until it should pass legislation on the subject, the provincial franchises were to prevail. From 1867 till 1885 the Provincial franchise was accepted. In 1885 the Dominion fixed the qualifications of voters. This was not wholly satisfactory, and in 1898 the Dominion

reverted to the old system.⁵ In 1915 the right to vote was given to every male British subject of 21 years of age or upward serving in the military forces of Canada in the present war who had within six months before his enlistment been resident in Canada. Every such person was given the right to vote in the electoral district in which he had so resided, unless he had a vote in some other electoral district, and absence from Canada did not debar him from voting, provision being made for taking his vote abroad. (5 Geo. V, c. 11, Dom.)

The Minister of Justice, Mr. Doherty, introduced a Bill, August 13, 1917, the purpose of which he said was to make more adequate and complete provision for taking the votes of soldiers, but which at once he showed to be of much greater significance. That Bill made a military elector of every person, male or female, who was a British subject, whether or not ordinarily resident in Canada, and whether or not an Indian, and who within or without Canada was enrolled for active service in the Canadian forces, or within Canada in the Flying Corps, the Naval Air Service, or Auxiliary Motor Boat Patrol Service (which are technically Imperial), whether as "officer, soldier, sailor, dentist, nurse, aviator, mechanic, or otherwise" (if he had

been honorably discharged, his qualification was not lost), also every person, male or female, a British subject ordinarily resident in Canada, whether or not a minor or an Indian, who was on active service, military or naval, in Europe in the forces of the King or of the Allies.⁶ For the first time in the history of Canada, the right to vote by one who did not appear in person at a polling booth in Canada was given by the Act of 1915. In the present Act, for the first time in Canada, the right to vote was given (1) to persons not ordinarily resident in Canada, (2) to women (nurses), (3) to minors on active service. The Bill was rather languidly opposed in the House of Commons. Some complaint was made that persons who never saw Canada and might never see Canada, who knew nothing and cared nothing about Canada, might vote,⁷ that the woman who chanced to be a military nurse had a right to vote, while another woman equally valuable to the nation by her services at home had none, and that boys of 18 or less should have a vote because they were abroad instead of at home. (There was not much complaint about the Indian.) But the Bill passed without a division. (House of Commons Debates, 1917, unrevised edition, pp. 5479, 5480.) The same approval was given by the

⁵The Electoral Franchise Act (1885) 48-49 Vict., c. 40 (Canada). This was a party measure, the Liberals demanding the acceptance of the Provincial lists, the Conservatives insisting upon a separate Dominion franchise. The act of 1885 was passed only after a long and bitter struggle, and when the Liberals were returned to power, as they were in 1896, they repealed the obnoxious act and reinstated the Provincial franchise. (1898) 61 Vict., c. 14 (Canada).

⁶7-8 Geo. V (1917), c. 34, sec. 2c (Canada). The Royal Flying Corps, Naval Air Service, and Auxiliary Motor Boat Service are filled with young Canadians, but technically belong to the Imperial Forces.

⁷By our law everyone is a British subject whose father or grandfather, when he was born, was a British subject, though he himself may have been born abroad.

Senate after at least one vigorous protest. (Debates of the Senate, 1917, unrevised edition, pp. 837, 1052, 1103 et seq., 1191 et seq. See the speech of Hon. Senator Cloran, pp. 1100 et seq.)

One provision of the Act may be here referred to as it will come up again in another connection. Every military elector was to have his vote counted in the electoral district in which he had resided four months of the twelve preceding his enlistment if he could specify such a place; if he could not, then in any electoral district in which he had ever resided; if he could not specify such a place, he could allot his vote to any electoral district. (7-8 Geo. V, c. 34, sec. 3, Dom.) Military voters were allowed to vote for a party, Government, Opposition, Independent, or Labor (quite a novel provision) or for an individual. The Prime Minister, the Leader of the Opposition, and the recognized leader of any independent or labor organization was to name the approved candidate of his party. It is possible that the absence of any real objection to this act was due to the reason that those enfranchised might be expected to belong to both parties, not to one, and no great gain was to be expected from a defeat of the Bill.

But the case was quite different with another Bill, the War Time Elections Act, (7-8 Geo. V, 1917, c. 39, Canada). On its introduction in the House of Commons, it was explained that the

Act was mainly to repair the injustice which it was felt those overseas were visited with in not being able to exercise upon their fellows the influence they could exert under normal circumstances. It was proposed to do this by giving a vote to every woman, a British subject qualified as to age, race, and residence, who was the wife, widow, mother, sister, or daughter of any person, male or female, living or dead, who served in the military forces of Canada without Canada, or in her naval forces anywhere.

Certain of the Provinces had woman suffrage. In the ordinary course it was to be expected that all women who had the provincial suffrage would have suffrage for the Dominion also.⁸ Those opposed to conscription were not unnaturally of the belief that women would vote against any measure which would subject their men-folk to the draft, but they believed with equal probability that most of those whose own men-folk had gone overseas would vote that other men should go to their relief. In any case, this was a partial enfranchisement. No woman had ever voted at a Dominion election; and there was very little objection made by women who were not enfranchised at their exclusion from the vote.

But a large class of voters were deprived of the right to vote which they already had: Mennonites⁹ and Doukabors (who had been exempted from military service) except

⁸ There is a difference of opinion amongst legislators as to whether, without this Act, all women voters in such Provinces would have a vote for the Dominion. I do not pass upon the question.

⁹ Quakers, "Menonists," and Dunkers were exempted from military service in Upper Canada as early as 1793. 33 Geo. III, c. 1, sec. 22 (U. C.).

such as should have volunteered and been placed on actual service, and also all who applied for exemption from military service on conscientious grounds were deprived of a vote. (1917, 7, 8 Geo. V, c. 39, sec. 2, amending sec. 154, Dom.)

Then followed a far-reaching provision. No one was to be allowed to vote who, born in an enemy country or in a European country, whose mother tongue was the language of an alien country, had not been naturalized on or before March 31, 1902, except volunteers who had enlisted or tried to enlist, or their grandparent, parent, son, or brother, or Christian Syrians or Armenians, or women qualified as kin of a combatant.

The reason for the exclusion of non-combatants is obvious. The election was to be a war-time election, the issue was to be conscription, and it was to be expected that they would vote against conscription. The Provinces of Saskatchewan and Alberta have a large population of inhabitants of German and Austrian extraction. (I have been told by a former Lieutenant-Governor of Saskatchewan that thirty per cent of the people of that Province are of German or Austrian extraction. Official returns show that from July, 1900, there had come into Canada immigrants from Austro-Hungary, 200,016, from Germany 38,807, from Bulgaria 32,267.) While these did not prove themselves so offensive as many of

their race in the United States, it was notorious that the sympathies of many were with their fatherland, and it was to be expected that most would vote against any measure intended to send them or other soldiers to fight against their kin in Europe.

Many of these immigrants and their sons volunteered for service against their European kinsfolk. Wherever their origin was known they were rejected, but no small number passed themselves off as Russians and so were accepted as Canadian soldiers. It was not proposed to take away the vote from such soldiers or their male kinsfolk in the first or second degree. These provisions for disfranchisement were bitterly fought in Commons and Senate. On the one hand it was claimed that it would be a Prussian-like breach of faith with these men who had been induced to come to Canada and become British subjects on the implied promise that they should have all the rights of British subjects. Sir Wilfrid Laurier said (House of Commons Debates, p. 5889): "This is not a Liberal measure, it is not a Canadian measure, it is not a British measure; it is a retrograde measure and a German measure." On the other hand it was claimed that no one, simply as a British subject, has the right to vote. "The rights of British subjects are rights given under the law of Canada. The law of Canada must be dictated by the needs of the hour for the safety of Canada."¹⁰ No promise express or

¹⁰ Even a Province has the right to deny any class of British subjects the vote. The franchise, whatever theorists may say, is a privilege granted or withheld at the option of the state, not a natural right. The Judicial Committee of the Privy Council, our final court of appeal, decided that a Province has the right to deny the franchise to Japanese, even though they may be British subjects. *Cunningham v. Tomey Homma* (1903), A. C., 151. Hundreds of thousands of British subjects, hundreds of thousands of American citizens have no vote. The words quoted are those of Hon. Mr. Meighen, who took the lion's share of the debate on the Government side. House of Commons Debates, 1917, p. 5898.

implied had ever been made to these Germans and Austrians.

After a long and strenuous fight in House and Committee, the Bill received its third reading, September 14, 1917, when it was carried by a vote of 53 to 32, there being a large number of pairs, 41 in all. Most, but by no means all, who voted or were paired against the Bill were opposed to conscription. All in favor of the Bill were in favor of conscription. (House of Commons Debates, 1917, unrevised edition, pp. 5723 to 6199 almost continuously.) The Senate, after little debate, and that almost a repetition of what had been said in the Commons, gave the Bill its third reading September 19, with a few amendments of no consequence here. (Debates of the Senate, 1917, unrevised edition, pp. 1205 to 1324 almost continuously.) It received the Royal assent the next day: and Parliament was prorogued.

The general election came on with the Liberal party rent in twain. While there were here and there little eddies of personal ambitions, local animosities, old political prejudices, the broad issue was compulsory military service as a means of prosecuting the war. While Sir Wilfrid Laurier insisted that Canada was in the war to the finish and confidently asserted that if he were returned to power he could and would procure a sufficient and satisfactory number of recruits without compulsion, and while most of his supporters in the English-speaking Provinces were in favor of pressing on the war—some indeed were openly and

insistently in favor of conscription—still in the Province of Quebec and in some parts of Canada where the French-Canadian vote was decisive, there was plain speaking against Canada's further military participation in the war.

The real cause of the necessity for conscription was the failure of the Province of Quebec to furnish a number of volunteers in proportion to her population. The reasons assigned are various, and I do not discuss them. Sir Wilfrid Laurier and many others openly and repeatedly said that it was the fault of the recruiting system of the government that the required numbers were not secured. No doubt mistakes were made, as have been made in England, Ireland, the United States, all democratic non-military countries. Whether other methods would have been more successful is a matter of opinion.

Perhaps it would not be out of place to mention the reasons for Quebec's failure to respond more generously to the call for volunteers, as given by a French Canadian Senator (the Hon. L. O. David, August 8, 1917, Debates of the Senate, 1917, unrevised edition, pp. 639 et seq.) (1) Since the cession of Canada, the French Canadians have been taught by their political leaders that they never would be forced to go and fight outside of Canada. (2) Candidates and their friends at previous elections had stated that the safest way to avoid conscription was to vote for the Government at these former elections. (3) There were three, and are

now two, members of the Cabinet who were elected by declaring and promising that they would be opposed to any participation of Canada in the wars of the Empire. (4) These Cabinet ministers had convinced French Canadians that participation in the war was almost a crime, and that Laurier and his friends were traitors to Canada. (5) Even when recruiting was going on, they were told that the best way to serve the Allies was to furnish food and munitions. (6) They had heard that the Government were spending much money to induce American workmen to come to Canada and had induced a large number to do so; this proved the great need of labor at home. (7) The French Canadians had not been regimented together as promised, but scattered among the English regiments commanded by officers whose language they did not understand. (8) No amount of enlistment and war service of all kinds was effective to "stop the wave of invective and accusation of which they were the victims." (9) The French Canadians are the most peaceful people in the world, and very few have had any military training. (10) Faithful lovers of Canada, they were inclined to concentrate all their affections upon her. (11) They were convinced that conscription was directed against them.

Whatever the cause and however great the default, no few French Canadians volunteered, amongst them some Nationalists, and their valor and efficiency were proved in many a bloody battle. The memory of their gallant deeds will never die till Courcellette is forgotten.

On the Government side there was a clear stand taken. "Anything to win the war; Canada cannot desert her boys at the front." Conscription was held to be necessary, and a Government must be returned whole-heartedly in favor of it and to be trusted to enforce it vigorously and without delay. The result was the return of the Union Government with a substantial majority, a majority now increased by the votes of the soldiers in Britain and France.

It was expected that the provision already mentioned giving the non-resident military voter the right to allot his vote to any constituency might have curious results; but no difficulty has in fact followed.¹¹

All the peculiar provisions for the franchise are recognized as being unusual and contrary to practice—unconstitutional in our sense of the word, though perfectly valid and therefore constitutional in the American sense. They are considered to be justified or

¹¹ A curious complication has arisen in connection with the Yukon, which has one member in the House of Commons—the Opposition candidate received a majority of the votes cast in the Yukon, but on the soldiers' votes being counted abroad it was found that this majority was more than overcome by that vote. The Opposition candidate contended that the soldier vote should not be counted; the Military Voters Act provided that the Prime Minister, the Leader of the Opposition and other Leaders should notify their choice of candidate "within five days after the day of nomination." The election for the Yukon was delayed and the votes of the soldiers taken before the nomination in the Yukon. The House of Commons will determine as to the validity of the soldiers' votes. *Adhuc* (May 17) *sub judice lis est*. [Now, (June) the House has determined in favor of the validity of these votes, and Mr. Congdon, the opposition candidate, is definitely defeated.]

excused by the exigencies of the present state of affairs in Canada, but no one would think of making them permanent. Accordingly the disfranchisement only lasts "during the present war and until demobilization after the return of peace," and the whole question of woman suffrage is promised early attention. It will probably be considered that much of this legislation was on Sir Wilfrid Laurier's principle:

"If the Germans win the war, nothing else on God's earth matters," certainly some of it was.

Whatever else may be said or thought of Canada, I think all will concede that she is willing to do and risk anything rather than fail to do her part in the war. And whatever else may be said of her Constitution, it is flexible enough to enable her to do her full duty.

Patriotism and Democracy

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The charge has frequently been made against democratic peoples generally, but especially against the people of the United States, that they are so commercialized, so deeply engrossed in the struggle for wealth, that they are incapable of feeling or manifesting any devoted or sustained patriotism. At times, before our entry into the war, it has seemed almost as though we in America would have to admit the justice of the charge. Since April, 1917, however, all is changed, and the events of the last ten months more than justify the proud conviction that we are as ready as any people on earth to give our all for the defense of our homes, our institutions, and our ideals.

We are by instinct and tradition a peace-loving people. Our marvelous prosperity is due as much to the fact that we have heretofore been spared the menace of war as to the vast natural resources within our borders. We have heard from time to time, like the thunder of some far distant storm, the

rumblings of Continental discord. But we have been undisturbed. We have gone our peaceful and contented way, taking so much as a matter of course the blessings of our security that it is to be feared we have at times failed to appraise them at their true value. So great was this sense of security that it was impossible for many, even after two years of war the like of which the world has never seen, to believe that the storm would or could strike us. When, however, it became clear that our position, though probably safe for the present, even should Germany win, could not long remain so, we became suddenly aware of the value of all that we had been taking as a matter of course, our free institutions, the sanctity and security of our homes, the Anglo-Saxon ideal of womanhood, the Anglo-Saxon ideals of honor, humanity, and justice. We began to realize what a hell on earth would be this land of ours if subjected to the arrogant, cruel, and unscrupulous dictation of

Teutonic medievalism. There was forced upon us the necessity of rousing ourselves to the defense of those institutions in the maintenance of which, we are wont to believe, lies the security of our ideals.

There was not the slightest suggestion of hysteria, not the least manifestation of jingoism in our action. On the contrary, the country as a whole seemed moved by a seriousness of purpose which clearly reflected a mature deliberation. The magnificently quiet and uncomplaining acceptance of the draft; the broad and hearty response to the Liberty loans; the generous contributions to the Red Cross and the Red Triangle; the cheerful compliance with food and fuel restrictions; the inspiring rush of the youth of the land to the officers' training camps; the heavy financial sacrifices voluntarily made by those freely giving their services in countless governmental administrative and clerical capacities; the willing acceptance of hitherto unknown burdens of taxation—all attest an appreciation of and a devotion to our institutions and ideals, which are of the very essence of patriotism—a love and devotion strong enough, without hesitation, to choose struggle and privation, suffering and death, rather than surrender and loss.

Much as we loved peace, much as we desired its continuance, we had no choice. We must fight, must fight until, as we all realized and as Mr. Wilson so happily put it, the world is made safe for democracy. The issue was clear even to our slow perception. We must take our place in a struggle, no longer one between nations or peo-

ples, but between ideals, between barbarism and civilization, between medieval autocracy and modern democracy. The antithesis is so sharp that it may be apprehended by the dullest, and, as a statement to the enemy and to neutrals of our war aims, we need go no further than the phrase above used. We cannot stop here, however. The word "democracy" has been and is used so loosely, and to cover such a diversity of political ideals and dogmas, that honesty as well as prudence urges an analysis of the situation, in order, if possible, to have clearly before us a true conception of that for which we and our allies are fighting to make the world safe.

What then is democracy? One will tell us that it is a government characterized by a prevailing attitude of mind, a spirit of brotherliness. Another will say that it is a government without officials, in which the people themselves meet and carry on the functions of government. A third will insist that it is a government controlled by, and for the benefit of, the working class as distinct from all other classes. Still others hold that there can be no real democracy so long as there is any governmental authority or restraint put upon the individual, while opposed to them are those who as stoutly maintain that the only true democracy is the social democracy, in which the individual is, as far as possible, submerged in the group. And so we might go on; but it is quite clear without multiplying illustrations that the question is not easy of answer. Moreover, if we employ more general terms, we are no

better off. To say that democracy is self-government gets us nowhere, for then we have left the question what is self-government? And only when we look beyond it do we get any help even from that definition which comes most readily to the minds of us all, namely, that it is a government of the people, by the people, and for the people; for what is a government by the people, and what is a government for the people? These two phrases must be taken together, and when so taken, they mean, if they mean anything, a government in which every citizen, *so far as the law of the land is concerned*, is on an equality with every other citizen, politically, economically, and socially; a government in which no group or class, in virtue of either hereditary right or constitutional designation, enjoys privileges or opportunities recognized by law which, by law, are denied to others; a government which secures to all, the humblest, the highest, the poorest, the richest, the most ignorant, the most learned, without preference or partiality, absolute equality under its laws. This is the ideal which was in the mind of him who framed the definition. It is the ideal which, however it may seem to have been lost sight of at times, the people of the United States have ever had before them. It is the ideal to the attainment of which our most fundamental institutions are directed.

We find it underlying Magna Charta and the various confirmations thereof and the Bill of Rights. We find it in the Declaration of Independence. We find it in the various bills of rights in the constitutions of our several states.

We find it in our federal Constitution, where the only qualifications for the offices of President, Senator, or Member of the House of Representatives are those of age and citizenship. We find it underlying such provisions as the following: Art. I, sec. 9, clause 2, "the privilege of the writ of habeas corpus shall not be suspended unless where in cases of rebellion or invasion the public safety may require it," and also clause 3, "no bill of attainder or ex post facto law shall be passed," and clause 7, "no title of nobility shall be granted by the United States." It is of the very essence of the following amendments to the Constitution:

Article I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article III. "No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

Article IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article V. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment

or indictment of a grand jury, except in cases arising in the land and naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Article VI. "In criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Article VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Article XIII. "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

Article XIV. "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Article XV. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

Only when popular government, as distinct from autocratic or absolute monarchical government, is based upon a recognition of the elemental value of this ideal, and is employed in an honest and sincere effort to secure its establishment and enduring triumph, can it or will it arouse or sustain in its members that loyalty and devotion which we call patriotism. Mexico and certain of her sister democracies of Central and South America, constantly torn by factions, Russia, revealing an intolerance and exercising a tyranny unsurpassed by the Romanoffs, but withal pitiful in its impotency, demonstrate beyond the possibility of dispute that democracy is not an end in itself, but merely a means to an end. Democratic government, so called, can successfully lay claim to any degree of virtue only when it is in fact a government by all the people for all the people; that is, a government in which all have the same political standing, and which is so ordered as to secure to all the people (not an economic group any more than an hereditary class) *liberty within the law, justice before the law, and equality of opportunity under the law*. It is because the people of the United States, after more than a century of experience, are convinced that our own democracy is of this type, and that it has secured to us the blessings of liberty, justice, and equality of oppor-

tunity in a higher degree and with a surer guaranty, than they are secured to any other people on earth, that they have rallied so magnificently to its defense from external attack. The great and only difficulty was to rouse the people to a realizing sense of their danger. With this once accomplished, however, in spite of the treasonable words and actions of some so-called pacifist groups, in spite of the plottings of alien sympathizers, in spite of a national habit of easy tolerance, the people have gone about the great task with a quiet, grim determination which leaves no doubt of the issue.

But it is not alone from without that democracy is threatened. And though we are more immediately concerned with our own, this is equally true of the democracies of England, France, and Italy, in fact of all democracies. The very nature of democracy is such as to develop and foster within itself forces the effect of which, if unchecked, would be to distort and debase it to an absolutism more tyrannical and despotic than that formerly existing under the Czar of all the Russias, the sole difference being the substitution of many masters for one. In fact this is just what we are witnessing in Russia today. The reins controlling the lives and fortunes of countless millions of people have, through some vagary of fate, been tossed into the lap of a small group of dreamers and visionaries. These, with a fanatical unscrupulousness and lack of all sense of honor, proceed to put their theories into operation. For the benefit of all the people or even under the claim that it is for the benefit of all the people? No, rather

with the boastful assertion that it is for the benefit of a part, and that a very small part, of the people.

Under normal conditions and in a healthy state, these germs of discontent and subversion are held in check or counteracted by the ordered and satisfactory functioning of the state, just as the countless disease germs at all times carried about in the human body are without conscious effort held in absolute check by the healthy functioning of normal life. But just as the human body, through exhaustion, exposure, or being subjected to abnormal conditions, becomes more vulnerable to internal poisons, so the state, under abnormal conditions, finds its life more easily and more boldly attacked from within, while at the same time it requires a very conscious effort to marshal its powers of resistance. Abnormal conditions, social, economic, and political, consequent upon the war, are and for some time have been affecting the government and the people of every state in the civilized world, whether belligerent or neutral. We are not, nor could we hope to be, an exception. The necessity for a unification of all our resources and energy (the *sine qua non* of military achievement) has resulted in a concentration of power in the hands of the executive branch of the government almost beyond belief, and such as, in normal times, would be regarded as marking the downfall of our popular institutions. The magnitude of the international crisis has forced an abandonment of our traditional international aloofness. The necessary conscription of a large army has brought millions of our citizens into an intimate

dependence upon, and responsibility to, the federal government heretofore altogether unknown. Such action, together with the federal control of railroads, fuel, and food, are all steps in the direction of socialism, which will inevitably lend great encouragement to those who contend that all things in which the public claims to have an interest should be held and administered by the state. So long as the war lasts, that is, so long as all are under the shadow of a common danger from without, the dangers from internal factions are comparatively slight. But when the external menace is removed and we turn again to the normal activities of peace, the disrupting and disintegrating forces within will flare up with a fierceness beyond all parallel, and unless they are met with wisdom and courage, may render worthless that democracy for which we particularly are fighting to make the world safe.

When the war is over there will immediately follow a period of readjustment which will be as wholly without precedent as the war itself. Purely war-time industries must be liquidated. Old-time peace industries must be revived or must be adjusted to meet increased or decreased demand. Newly found markets must be developed in the face of the fiercest competition, old markets held or won back. Countless mechanical devices, invented for purely warlike ends, must and will be made to serve the ends of peace. Industrial activities subjected to governmental control must be retained or relinquished. The balance between male and female labor must be redetermined. Finally,

millions of men must be reabsorbed in the various walks and callings of civil life. All this cannot be accomplished without some hardship, some friction, some discontent, and a very considerable amount of economic confusion and social unrest, in other words, without the presence in the life of the state of those very conditions which render it peculiarly susceptible to the internal poisonings of passion, prejudice, ignorance, fanaticism, class selfishness, and party strife.

The government of the United States is generally conceded to be the greatest and most successful democracy the world has produced. That we ourselves are convinced of its worth is attested, as has already been said, by the quiet, self-sacrificing determination with which we have taken up the burden of its defense. But what is the reason for this conviction? There is but one, namely, that for one hundred and thirty years it has, with certainty and success, secured to us, and to all of us, liberty, justice, and equality of opportunity under the law. And it has done this through the recognition and enforcement of the fundamental principle underlying all the provisions of the Constitution above cited, namely, that minorities, as well as majorities, have the right to life, liberty, and property, and that these rights must be respected by the majority. Of course there are those who deny not only that our government has secured to all of us liberty, justice, and equality of opportunity under the law, but even that minorities have any rights which majorities are bound to respect. These malcontents, however, are made up

largely of visionaries and fanatics, demagogues and parasites, who, mistaking license for liberty, a mushy sentimentalism for justice, and equalizing legislation for equality of opportunity under the law, by vague and impossible promises, unscrupulous misrepresentation, and appeals to class hatred, draw after them the ignorant, the unfortunate, the unhappy, the lazy, and the vicious. In the period of readjustment predicted, these forces of unrest and disruption will inevitably be dangerously augmented from the ranks of the many who have become accustomed to being better cared for by the state than they ever were able to care for themselves, and who have been made much of by an enthusiastic and welcoming public, and who therefore will feel little or no inclination to take up the struggle and burden of self-support. Their minds will be fertile ground for the seeds of radicalism in almost any form. That the theorists and extremists of all types will recognize in this situation their opportunity, and will make the most of it, is an absolute certainty. That in the end they can succeed in imposing their doctrines on the people of the United States is no more to be thought of than that Germany will be able to impose upon them her Kultur. But that, unless checked and held in check, they can do an infinite amount of harm; that, in the name of progress, they can undo a vast deal that is of permanent worth, is as certain as that Germany has been able to do a vast deal of harm to civilization which she could not have done had the Entente Powers and ourselves been thoroughly awake to the danger that threatened us.

Our characteristic, easy-going, optimistic tolerance, coupled with the fact that the sane and industrious elements of our population will everywhere have their attention concentrated on the new and absorbing economic and industrial problems, will make the danger all the greater. If it was difficult to awaken in the people a realization of a menace to our liberty, our institutions, and our ideals from without, it will be doubly hard to convince them of a menace from within. The average citizen is serenely unconscious of the intimate connection between certain of our most cherished ideals and liberties and the governmental instrumentalities wrought into the fabric of our Constitution to secure them. For him the difference between embedding in our federal fundamental law a prohibition of the manufacture, sale, or distribution of liquor within the United States, followed by one vesting in Congress and the legislatures of the several states concurrent powers of legislation for its enforcement, and an amendment to such fundamental law empowering Congress by legislation to prohibit the manufacture, sale, and distribution of liquor, is one of purely academic interest, if of any interest. Behind the proposal to break down the distinction between fundamental and statute law, by making the former as easily alterable or repealable as the latter, he fails to see any danger to minority rights. As the result of a successful movement to take from the courts their power to pass upon the constitutionality of statutes, he but dimly perceives a door flung wide to all the evils of discriminatory and class legislation. Beguiled by the

false maxim that if the people are able to adopt their constitutions, they are able to construe them, he is with difficulty persuaded that the doctrine of popular recall of judicial decisions on constitutional questions is inconsistent with constitutional guaranties of liberty, justice, and equality before the law. He is slow to perceive that the movement for the recall of judges is a direct step towards the substitution of a government of men for a government of laws. Though thoroughly apprehensive of and bitterly opposed to socialism, I. W. W.'ism and all other specific forms of radicalism, he does not suspect that the adoption of any one of the foregoing governmental changes, not to mention others, paves the way for the introduction of any and all of those "isms" whenever their infection shall have spread to a majority, or whenever an infected minority may have secured a hold upon the machinery of government. Should this ever be the case, the difference between our then situation and that of Russia today would be one of degree only.

If we have deserved and have been accorded a place as the greatest democracy the world has ever known, if our experiment has proven successful where others have failed and are still failing, it is because we have recog-

nized the necessity for restraints upon majorities in favor of minorities, other than the mere self-control or magnanimity of such majorities, and have incorporated into our fundamental law certain features the sole object of which is to make effective such restraints. And it is to those features almost entirely that we are indebted for that liberty, justice, and equality of opportunity under the law which, when threatened from without, rouse and maintain a patriotism second to none. But if these institutions, proven for four generations, if this liberty, justice, and equality before the law, enjoyed for the same period, are worth patriotic effort and self-sacrifice to render them safe when attacked from without, are they not worth the same patriotic effort to render them safe from far subtler though not less formidable attacks from within?

The price of liberty, says the old maxim, is eternal vigilance; and we would do well to remember this in the days to come, for unless we guard well democracy—our democracy—for which we are now fighting to make the world safe, it may be that we shall find ourselves plunged into another and no less bitter struggle "to make democracy safe for the world."

Bolshevism Thinly Veiled

John Dickinson of Delaware, a member of the convention which framed the Constitution of the United States, asked and answered an important question in the following words: "For who are a free people? Not those over whom government is reasonably and equitably exercised, but those who live under a government so constitutionally checked and controlled that proper provision is made against its being otherwise exercised." It will not do to trust to the mere magnanimity of majorities. They must be constitutionally checked and controlled. Democracy posts sentinels to guard it from without. But also it needs a provost marshal in the midst of its own camp. Better than any other instrument ever devised by the wit of man, the Constitution of the United States has preserved the rights of the citizens and secured to all living under its protection the blessings of true and ordered liberty. But never has it been free from peril; and its foes have been "they of its own household." This is especially true today, when civilization goes reeling, when the ferment of war is terribly at work within the organism of society, and when the philosophy of unrestraint has gripped a great nation and brought it to the dust. There is something peculiarly sinister in the suggestion, now whispered behind the hand, now openly avowed, that as soon as the war is over Congress or the states must call a convention to revise the Constitution. It is no longer proposed to amend it in detail. It must be scrapped. A new constitution must be

written, presumably by and for the American bolshevists.

For, let no one doubt it, there are plenty of American citizens whose bolshevism is very thinly veiled. Let us collate a few facts. For instance, an act of Congress has recently been passed to punish disloyalty and sedition. The one member of the House of Representatives who voted against this measure was the solitary Socialist member. An impressive lesson is to be learned from the results of the municipal elections in 1917. In New York, the Socialist candidate for mayor polled 145,895 votes, which was over 21 per cent of the total vote. In the judicial election in Chicago, the Socialists cast more than one-third of the entire vote. In Cleveland, the election showed a gain in strength for the same party of approximately 350 per cent over the last municipal election, and in Cincinnati the proportion of their gain was nearly 400 per cent, while in Toledo they cast 35 per cent of the total vote. Summarizing the results, a writer in the *National Municipal Review* says: "The fifteen cities from which we have been able to derive accurate election statistics show that out of the total vote of 1,450,000, the Socialists polled 314,000, or 21.6 per cent of the whole. This is over four times the proportion of the vote usually polled by the Socialist candidates in these cities. Had the Socialists polled an equal proportion in the presidential election of 1916, their total vote would have been approximately 4,000,000." And it

should not be forgotten that in the recent senatorial election in Wisconsin, where the issue of loyalty was sharply drawn, more than 100,000 citizens expressed their preference for the Socialist candidate. This vote, says the *Washington Star* with entire justice, "is a declaration in favor of a socialization of the United States. It turns its back squarely on the institutions established by Washington and preserved by Lincoln, and dismisses them as having been well enough in their time, but as in a large measure, become obsolete today."

Even less ambiguous is the attitude of the so-called "National Party." In its platform adopted March 8, 1917, we read: "Labor is gaining a ruling position in all fields of society, and this position must be strengthened until labor controls society." That is to say, we must abandon our outworn notion of government of the people by the people and for the people, and substitute a government of, by, and for certain "councils of workmen's delegates," as in Russia. For the camouflage which is erected to conceal the maximalist proclivities of American socialists and their like is absurdly transparent. It was hardly more than a pretense, for instance, in the pronouncements of the Illinois State convention of the Socialist party last May, which declared for constant opposition to the war and for the immediate recall of American soldiers from France, and also demanded that the government of the United States should forthwith give recognition to the bolshevist government of Russia. This was also the

tone and temper of the State conference of Socialists in Minnesota in February, which nominated for the governorship a man who was then under sentence of a federal court for obstructing the draft, but out on bail pending an appeal, and which "passed resolutions indorsing the policies of the Russian bolsheviki," as the newspapers record. But perhaps the climax of effrontery was reached by the State Socialist convention in Pennsylvania in March, which sent a cablegram of congratulations to the soviet government at Petrograd, in which it said: "Your achievement is our inspiration." Possibly it may be time for some of us other Americans, who are not warmly in love with pillage, rapine, and anarchy, to inquire pretty seriously whether we want this sort of "inspiration" to control our destinies. For that is exactly what will happen if we wilfully shut our eyes upon existing facts, if we minimize the danger, or if we surrender ourselves to a slothful and easy-going optimism. As an antidote to the opiate of indifference we commend to our readers Professor Doughty's very impressive and thoughtful paper published in this number of the *REVIEW*.

After all, the internal collapse of Russia, melancholy as is the spectacle, carries a wholesome lesson for America. It should warn us against rash tampering with our own institutions of government. There was no exaggeration, but much sound sense and wisdom, in the declaration lately made by Senator Kellogg that "there is a rising tide of socialism today which threatens

the foundations of representative democracy the world over. There are well-meaning men in their ranks. They believe that the millennium is coming, that the government can exercise the functions of all private enterprise, and that all fields of human endeavor can be equalized. It is an old, old dream, which the world has discarded again

and again since the dawn of civilization. The best guarantees to the people of this country for the security of our institutions are those principles embodied in the Bill of Rights which have been tried by the experience of ages and are firmly fixed in the Constitution of this land."

Alien Voters in the States

The Fourteenth Amendment provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." But this was to prevent the States from denying the privileges of their citizenship to any of the persons described. It does not prevent a State from according substantially all the benefits of its own citizenship, including the right of suffrage, to aliens and even to alien enemies. And lately the country has awakened, with a shock of painful surprise, to the fact that this is exactly what at least seven of the States have done. In Arkansas, Indiana, Kansas, Missouri, Nebraska, South Dakota, and Texas, immigrants who have simply taken out their first papers (declared their intention at some future time to become citizens of the United States) are included in the constitutional definitions of qualified voters. And it must be remembered that this gives them the right to vote not only for State and local officers, but also for members of either house of Con-

gress and for presidential electors. There is a similar provision in the constitution of Alabama, but with the proviso that the "first-paper men" shall lose the right to vote if they do not become naturalized as soon as they are entitled. Wisconsin also permitted persons of foreign birth to vote, but the constitutional provision in that behalf contained a time limit, the privilege so given expiring in 1912. In Michigan, "every male inhabitant of foreign birth, having resided in the State two years and six months prior to the 8th day of November, 1894, and having declared his intention to become a citizen of the United States two years and six months prior to said last named day . . . shall be an elector and entitled to vote." In at least four other States, the constitutional grant of the suffrage contains an unfortunate ambiguity, in that it gives the ballot to "citizens" of the State but without defining citizenship.

In the seven or eight States constituting what a Texas paper rather emphatically calls the "disgrace column," it is estimated that there are not less

than a quarter of a million persons of German, Austrian, or Hungarian birth who will be eligible to vote this fall. As the *Philadelphia Press* observes, "the thought of these individuals lining up with American citizens at the ballot box at a time when the United States is at war with their own countries is a very unpleasant one. It might be, too, that in certain districts they would be powerful enough to turn the election of members of Congress."

The chairman of the foreign affairs committee of the House of Representatives has introduced a bill to prevent alien enemies from voting, with the hope that it may be enacted into law before the November elections. But this runs counter to the explicit provision of the Constitution that electors of representatives in Congress "shall have the qualifications requisite for electors of the most numerous branch of the State legislature," and the similar clause in the Seventeenth Amendment. It is argued, indeed, that these constitutional provisions establish a minimum qualification for voters at federal elections, but not a maximum; in other words, that Congress cannot create a federal electorate wider than that of the several States, but might add a qualification additional to those prescribed by any given State, namely, that the voter should be a citizen of the United States. But the argument is more ingenious than convincing. Both Senator Kenyon and Senator Gore have brought forward resolutions for an amendment to the Constitution of the United States restricting the right to vote for members of Congress and for

presidential electors to native-born and naturalized citizens. Undoubtedly it will be within the competence of Congress to adopt a joint resolution to that effect and of the States to adopt it; but such action could not be completed within less than two or three years. It is pertinently remarked by the *Troy Times* that "the process of federal amendment is tedious. Pending ratification, the States concerned ought themselves to repeal the foolish laws by which they have thrust the ballot into the hands of men and women whose allegiance is first of all to foreign masters and on whose good intentions we have no reason to count." And it is encouraging to record that several of these States are proceeding in that direction, although it is not so simple a matter as repealing an obnoxious statute, since they must amend their constitutions. The people of Kansas, Nebraska, and Texas will have an opportunity, at the next State elections, to correct this grave fault in their fundamental law. The governor of South Dakota has also urged the legislature of that State to adopt and submit to the voters an amendment restricting the suffrage to citizens of the United States. It may be that others of the States concerned will take like measures. As to Arkansas, it is to be remembered that a convention for revising the constitution of the State is in existence, though it is at present in recess, in order that its committees may digest and prepare the proposals for amendment which may be made. The exclusion of alien voters henceforth should not be overlooked. As for Indiana, the constitution of that State

is so exceedingly difficult of amendment that not much is to be hoped, unless a constitutional convention should again be called.

In the last legislature of New York a bill was introduced for the purpose of amending the constitution in such manner as perpetually to exclude all but native-born citizens from holding any elective office. No doubt this goes too far, since in all our states there must be many naturalized citizens, of other than Teutonic stock and of unquestionable loyalty, who ought not to be deprived of the privilege of filling such offices as may be within the gift of their fellow citizens. But the country should be safeguarded against the

repetition of such an incident as that which occurred recently in Indiana, when it was discovered that the candidate who had been elected mayor of a city was an alien enemy. It is reported that the two senators from that state urged the President to promulgate a regulation which would prevent the person in question from assuming the office. But presidential regulations apply to classes of persons, not to single individuals. An appeal was also made to the United States court, but there being no Act of Congress to cover such a case, this also was fruitless. The remedy for the whole situation lies with the states themselves. Let them retrace their mistaken steps.

An Early American Bill of Rights

"No free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." The last clause of this famous declaration is especially apposite in times like these, when, for the supreme purpose of the war, some of the most cherished liberties of the American people have been deposited in pledge, not surrendered or forfeited, but to be redeemed and restored upon the return of peace. With this in view we reprint here one of the earliest and most complete declarations of the basic principles upon which the American system of government is reared. It is the Bill of Rights of Virginia, unanimously adopted as a part

of the first constitution of that state, on June 12th, 1776. Jefferson had it before him when he drafted the Declaration of Independence, and it strongly influenced the composition of similar codes of fundamental law in the other states, and these in turn, as is well known, furnished the model for the first eight amendments to the Constitution of the United States.

Its author, George Mason of Virginia, was one of the foremost statesmen of his day, well known for his liberal and democratic views. William Pierce of Georgia, a delegate to the constitutional convention of 1787, who left a series of illuminating little character sketches of his associates in that distinguished body, describes Mason as "a gentleman of remarkable strong

powers, who possesses a clear and copious understanding. He is able and convincing in debate, steady and firm in his principles, and undoubtedly one of the best politicians in America. Mr. Mason is about 60 years old, with a fine strong constitution." He was in fact 62 at the time, having been born in 1725. James Madison's tribute to him is as follows: "The public situation in which I had the best opportunity of being acquainted with the genius, the opinions, and the public labors of Col. Mason, was that of our co-service in the convention of 1787, which formed the Constitution of the United States. The objections which led him to withhold his name from it have been explained by himself. But none who differed from him on some points will deny that he sustained throughout the proceedings of the body the high character of a powerful reasoner, a profound statesman, and a devoted republican." It is perhaps in the last words that we are to find the key to Mason's political philosophy, at least if we add the statement that he had no fear of wholesome innovations, even somewhat radical in character, if only the liberties of the individual (to him the matter of prime concern) were adequately guaranteed. Thus, in the debate in the convention on the question of fixing the qualifications of electors of the House of Representatives, there was a strong current of opinion in favor of restricting the suffrage to freeholders. But Mason said: "We all feel too strongly the remains of ancient prejudices, and view things too much through a British medium. A freehold is the qualification in England, and hence it is imag-

ined to be the only proper one. The true idea, in his opinion, was that every man having evidence of attachment to, and permanent common interest with, the society ought to share in all its rights and privileges." It is true that Mason refused to sign the Constitution and joined with Patrick Henry in opposing its adoption by Virginia. But this was because he considered the "power and structure of the government" as planned to be "dangerous," concluding that "it would end either in monarchy or a tyrannical aristocracy." It will be remembered that the Constitution, as submitted, contained no bill of rights, and we may conceive this to have been Mason's chief objection to it. At any rate it is on record that, in the very last days of the convention, he rose in his place and "wished the plan had been prefaced with a bill of rights, and would second a motion if made for that purpose. It would give great quiet to the people, and with the aid of the state declarations a bill might be prepared in a few hours." Elbridge Gerry then moved for a committee to prepare a bill of rights, and Mason seconded the motion, which, however, was lost. Roger Sherman probably stated the opinion of a majority of the delegates on this point when he said: "The state declarations of rights are not repealed by this Constitution, and being in force are sufficient."

The statement which Mason prepared as a basis for the Constitution of Virginia was in its day regarded as radical. And truly it was so, in the sense that even the people of England, in several important particulars, had not then worked out for themselves so

large a measure of liberty as the Americans boldly asserted to be their heritage. Read today, practically every clause of it is accepted as a matter of course. But centuries of history lie behind its simple phrases, and centuries of future civilization and government depend upon their maintenance. Recurring to fundamental principles, then, this early American bill of rights is as follows:

"A Declaration of Rights made by the Representatives of the good People of Virginia, assembled in full and free Convention, which rights do pertain to them and their Posterity, as the basis and foundation of Government.

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that Magistrates are their trustees and servants, and at all times amenable to them.

3. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community; of all the various modes and forms of government, that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any

government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of Magistrate, Legislator, or Judge, to be hereditary.

5. That the Legislative and Executive powers of the State should be separate and distinct from the Judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they are originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

6. That elections of members to serve as representatives of the people, in Assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

8. That in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases, the military should be under strict subordination to, and governed by, the civil power.

14. That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

15. That no free government, or the blessing of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other."

From declarations such as this, in the constitutions of the various states and in that of the United States, result the explicit and guaranteed rights of the American people. As carried out in practice, they have evolved the specific thing known as American democracy, of which the true principles are these: That government exists for the sake of the governed, and not vice versa; that

all just government recognizes and is based upon the equal rights of all citizens to liberty and the pursuit of happiness; that the immunities of the people are not the gift of the state, but on the contrary the powers of the state are the gift of the people; that no deposit of unrestrained power can be made either in the state, in any of its organs, or in the will of a numerical majority, without putting the just liberty of men in peril; that democracy, viewing itself as a social as well as a political order,

must know no distinctions of class, creed, or possessions, but must secure inviolably to every one that which is justly his own; that no man or set of men are entitled to exclusive emoluments from the public or to exemption from the laws which bind all alike; and that all government should be maintained and continued only on the basis of just and salutary laws constitutionally ordained, impartially enforced, and faithfully obeyed.

Removal of Judges on Legislative Address

Those who believe that the prosperity of a nation depends primarily on the security of individual rights and liberties, that their protection is committed to the courts of justice, and that the maintenance of a competent judicial system depends upon the stability of tenure and the political independence of the judges, may view with concern the continual recrudescence of a demand for the "recall" of judges by popular vote. It may be admitted that the process of impeachment is difficult and cumbersome. It may be admitted also that cases sometimes occur in which a judge who has not committed an impeachable offense, and who should not be subjected to the inevitable stigma of an impeachment, has yet outlived his usefulness on the bench and yet cannot or will not resign his office. It may be that he has lost his reason, or has become incapacitated by severe and incurable illness, or perhaps that, without actual misbehavior in office, he has

shown himself unfitted by temperament or disposition for the judicial office. It is the object of this paper to show that the constitutions of no less than twenty-seven of our states already contain provisions for the removal from office of judges who, for any such reason, are unsuitable or unserviceable, and that the method provided is just, fair, appropriate to the occasion, and as far as possible from the noise and frenzy of a popular election. This constitutional method has been appealed to by extreme radicals as a precedent for the popular recall of judges. It is nothing of the kind. It differs in every important detail from the plan which they propose. But it is an adequate and appropriate method of dealing with a judge who ought to be removed, and wherever it exists, it renders wholly unnecessary any resort to the utterly inappropriate method of taking a vote at a general election. Besides, it could rarely if ever be employed against an

upright judge whose only offense was that he had rendered an unpopular decision—which is the real purpose of the “recall.”

Under the Stuart kings in England, the subservience of some of the judges to the royal power, and its arbitrary exercise against those who had the courage to persist in their constitutional duty without fear or favor, had led to a deep and general conviction that no man could be secure in the enjoyment of his rights or even sure of his life unless the judiciary were made entirely independent of the crown. Accordingly, in the Act of Settlement, which was passed and accepted by the sovereign towards the close of the reign of William III, it was provided that the judges should hold their office during good behavior and should be removable only on the request or “address” of both houses of Parliament. This was not intended to make, nor did it make, the tenure of the judges unstable, nor was it meant to make them subject to recall at the instance of Parliament or subject to legislative control. It was designed to strengthen their position, so that they should neither be overawed by the political wishes or threats of the sovereign nor constrained to do his will under pain of dismissal. And from that day to this the vigor and the rightful independence of the judiciary have been among the marked excellences of the British constitution.

In the federal constitutional convention of 1787, the proposition that the judges should hold their office during good behavior was adopted unanimously and without discussion. But

there was an instructive debate on the question of their removability. Dickinson moved to amend the clause relating to the federal judges by adding the words “provided that they may be removed by the executive on the application of the Senate and House of Representatives.” The motion was seconded by Gerry. In the debate on this proposal, Gouverneur Morris “thought it a contradiction in terms to say that the judges should hold their offices during good behavior and yet be removable without a trial. Besides, it was fundamentally wrong to subject judges to so arbitrary an authority.” Sherman “saw no contradiction or impropriety if this were made part of the constitutional regulation of the judiciary establishment. He observed that a like provision was contained in the British statutes.” Rutledge said: “If the Supreme Court is to judge between the United States and particular states, this alone is an insuperable objection to the motion.” Wilson “considered such a provision in the British government as less dangerous than here, the House of Lords and House of Commons being less likely to concur on the same occasions. Chief Justice Holt, he remarked, had successively offended by his independent conduct both houses of Parliament. Had this happened at the same time, he would have been ousted. The judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our government.” Randolph opposed the motion as weakening too much the independence of the judges. Dickinson “was not apprehensive that the legislature composed of

different branches constructed on such different principles would improperly unite for the purpose of displacing a judge." The question being put, Connecticut alone voted for Dickinson's amendment. New Hampshire, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, and Georgia voted "no." Massachusetts, New Jersey, and North Carolina were recorded as "absent," that is, their delegates were not in attendance on that day.

But though rejected for the federal government, the plan of removing judges on the initiative of the legislature has been adopted in the constitutions of twenty-seven states, beginning with Massachusetts. It is unnecessary to quote all these constitutional provisions at length; but the following analysis and comparison of them will show their differences in detail, and also the extent to which they concur in the general plan or method.

First, we are to consider in whom the power of removal is vested. In ten states, it is vested in the governor upon the "address" of both houses of the legislature, namely, Maine, New Hampshire, Massachusetts, Connecticut, Texas, Louisiana, Arkansas, Kentucky, Michigan, and Oregon. In Missouri, it is vested in the general assembly with the approval of the governor. In twelve states, it is vested in the general assembly or legislature without reference to the governor. These are Rhode Island, Utah, Tennessee, Nevada, Illinois, Ohio, Virginia, West Virginia, North Carolina, Kansas, Wisconsin, and Washington. In New York, judges of the Court of Appeals and

justices of the Supreme Court may be removed by concurrent resolution of both houses of the legislature by a two-thirds vote, while all other judicial officers, except justices of the peace and judges of inferior courts not of record, may be removed by the Senate on the recommendation of the governor. In Maryland, a judge may be "retired" from office for physical or mental infirmity by the general assembly with the approval of the governor, and any judge may be "removed" from office on the address of the general assembly, two-thirds of each house concurring. In California, the constitutional provision in this respect is substantially similar to that in New York.

Next, as to the cause for which a removal may be ordered, the constitutions of eleven states do not specify any cause, a judge being simply removable on address or by the vote of the necessary majority. These states are Maine, Tennessee, Utah, Ohio, New Hampshire, Massachusetts, Connecticut, Rhode Island, California, Kansas, and Wisconsin. In Illinois, Virginia, and New York, a judge is removable "for cause," without further specification; in Arkansas, "for good cause;" in Kentucky, for "any reasonable cause;" in Nevada, "for any reasonable cause which may or may not be sufficient ground for impeachment;" in Michigan, for "reasonable cause which shall not be sufficient ground for impeachment;" in Louisiana, for "any reasonable cause, whether sufficient for impeachment or not;" in Oregon and Washington, "for incompetency, corruption, malfeasance, or delinquency in

office, or other sufficient cause;" in Maryland and Missouri, for "inability to discharge his duties with efficiency, by reason of continued sickness or of physical or mental infirmity;" in North Carolina, for "mental or physical inability;" and in West Virginia, "when, from age, disease, mental or bodily infirmity, or intemperance, they are incapable of discharging the duties of their office." In the state of Texas, the causes for removal of a judge are stated to be "wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment."

In some states, but not all, it is required that more than a simple majority of the two houses of the legislature shall unite in presenting the address to the governor or in voting the removal. In Maine, New Hampshire, and Massachusetts, it is provided simply that judicial officers shall be removable "upon the address of both houses of the legislature." But Rhode Island and Virginia require a majority of all the members elected to both houses of the legislature. In California, Kentucky, and Texas, there must be a "two-thirds vote of each house." Seven states require a vote of two-thirds of the members of each house, namely, Connecticut, Utah, Tennessee, Maryland, North Carolina, Kansas, and Missouri. In the following nine states the necessary majority is two-thirds of all the members elected to each house: Nevada, Michigan, Louisiana, Ohio, New York, Oregon, West Virginia, Arkansas, and Wisconsin. And in Illinois and Washing-

ton the removal of a judge requires the concurrence of the extraordinary majority of three-fourths of all the members elected to each house.

In all cases where this procedure is resorted to it is customary to give adequate notice to the judge in question and to afford him an opportunity to make such objection or defense to the proceedings as he may see fit. But not all the constitutions secure him this right. In Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, Kentucky, and Arkansas, there is no constitutional provision for notice or a hearing. In the other states there is. The constitutions of Tennessee and Utah provide for ten days' notice to the judge proceeded against. In Nevada (and there is substantially the same provision in New York, California, and Wisconsin) the judge proceeded against "shall be served with a copy of the complaint against him, and shall have an opportunity of being heard in person or by counsel in his defense." In Illinois, Ohio, Maryland, Kansas, Texas, and Washington, the proceedings must be based "upon due notice and an opportunity of defense." In three states (Virginia, West Virginia, and North Carolina) the accused judge "shall have notice, accompanied by the causes alleged for his removal, at least twenty days before the day on which either house of the general assembly shall act thereon." In Missouri, the provision is that the person proceeded against shall have notice of the proceeding and the cause alleged "and he shall have the right to be heard in his defense in such manner as the

general assembly shall by law direct."

Finally, in regard to the manner of voting in the legislature and the formalities of the proceeding, it is provided in most of the states that the cause for the removal of the judge shall be entered on the journal, at least of the house in which the proceeding originates. This is the case in New York, Tennessee, Utah, California, Texas, Wisconsin, Washington, Nevada, Illinois, Virginia, West Virginia, and Missouri. In Oregon, the cause is to be "stated in the resolution;" in Michigan, it is to be "stated at length in the resolution;" in Washington, the resolution is to be entered at large on the journals of both houses; in Louisiana, Kentucky, and Texas, "the cause shall be stated at length in the address and inserted in the journal of each house;" and in Ohio and Kansas, the substance of the complaint shall be entered on the journal. In seven states, it is further provided that the vote in the legislature shall be taken by yeas and nays. These are New York, Tennessee, Utah, California, Texas, Wisconsin, and Washington.

This study of the constitutional provisions on the subject will enable us to appreciate the truth of certain observations of Senator Lodge in a recently published work. He says: "The procedure employed shows that there is no resemblance between the removal of a judge upon the address of the law-making body and the popular recall. They are utterly different, instituted for different purposes, and the former furnishes in reality a strong argument against the latter. In all cases of removal or attempted removal by address

of Parliament, the accused judge was carefully tried before a special committee of each house; he could be heard at the bar of either house; he could and did employ counsel, and he could summon and cross-examine witnesses. This process is as far removed from the recall as the zenith from the nadir, for under the recall the accused judge has no opportunity to summon or cross-examine witnesses, to appear by counsel, or to be properly heard and tried. He is obliged under the recall to make an appeal by the usual political methods, and at the same time to withstand another candidate, while he is forced to seek a hearing from audiences ignorant of the law and inflamed perhaps against him by passion and prejudice. He has no chance whatever of a fair trial." (Lodge, "Democracy of the Constitution," p. 73.) Adverting to the history of this procedure in the state of Massachusetts, Senator Lodge further says: "The power has been but rarely exercised by the legislature in the hundred and thirty years which have passed since our constitution was adopted, but it so happened that when I was in the legislature a case occurred, and I was a member of the committee on the judiciary to whom the petitions were referred. The accused judge was tried as elaborately and fairly as he could have been by any court or by the Senate if he had been impeached. He had counsel, he summoned and cross-examined witnesses, and the trial (for it was nothing less) occupied weeks. The committee reported in favor of removal, but the house rejected the committee's report. Some years later, after a similar trial, the address passed both

houses and the judge was removed by the governor for misdemeanors and malfeasance in office. A mere statement of the procedure shows at once that the removal by address is simply a summary form of impeachment with no relation or likeness to the recall. Removal by address is no more like the recall than impeachment is. If successful, they all result in the retirement of the judge accused, but there the resemblance ends." (Idem, p. 74.)

Some further lessons of importance as to the practical working of the removal by address may be gathered from a study of its operation in Massachusetts. In that state, the only instance of the removal of a judge of the Supreme Court was the case of Theophilus Bradbury, which occurred in 1803. The address for his removal set forth that he was incapacitated for further service on the bench by an illness which was beyond the hope of recovery. No allegation was made against his ability or his conduct as a judge, and in fact neither his moral character nor his judicial temperament was at any time subjected to criticism. On the governor's laying the address before the council (the consent of that body being necessary to warrant the governor in acting on the address) it was ordered that action should be postponed, and that Judge Bradbury should be furnished with a copy of the address. This being done, he filed a written protest against his removal from the bench, in which he claimed that he held by law an "estate for life" in his office, which could be forfeited only for misbehavior. But he added that he was financially dependent upon

his salary, and that if the legislature had made provision for his support, he would willingly have resigned. His case was argued before the governor and council by Theophilus Parsons, afterwards Chief Justice, and the removal was ordered and effected. It is probable that Judge Bradbury would have been pensioned, but he died within less than a year.

But although it has been necessary to remove only one judge of the highest court of the state of Massachusetts, the process of legislative address and executive action has there been applied to inferior judges more frequently, perhaps, than in any other jurisdiction. Between 1787 and 1882, there have been eleven instances of removal on address in Massachusetts as applied to inferior judicial officers, five of those so dealt with being justices of the peace, three judges of the common pleas, two probate judges, and one coroner. In two cases the ground for removal was conviction of a criminal offense, that of extortion in office. In the other cases the grounds were not stated in the address or in the subsequent proceedings, or are not now ascertainable, except in the case of one of the probate judges. This judge also held the office of United States Commissioner, and in that capacity he had issued a warrant for the surrender of a fugitive slave, which, in the circumstances of the time and place, aroused a storm of popular indignation. Mr. F. W. Grinnell, writing on the subject in the *Massachusetts Law Quarterly* for May, 1917, says: "In this instance, at least, it seems to be clear that the procedure was resorted to as a result of

popular excitement not in any way connected with his conduct of the office from which he was removed, and that the community lost an efficient judge by the removal, which was merely for the purpose of punishing an unpopular act." In two of these eleven cases, but apparently not in the others, an opportunity of being heard and of making a full defense was granted to the accused judges before the legislative committees to which the motion for an address had been referred; but this was done not as a matter of constitutional right, but because of customary practice. In the constitutional convention in Massachusetts in 1820, it was proposed that this part of the constitution should be amended by adding a provision that no removal of a judge should be ordered unless the cause for his removal was first stated, and entered on the journal of the house in which the proceeding originated, and that a copy should be served on the person in office, and that he should be admitted to a hearing in his defense. As we have shown above, such provisions as these are now found in the constitutions of many of the states which have adopted this procedure. But in Massachusetts, the amendment in question, with others, being submitted to the people at the polls, was rejected.

In that State, it has apparently always been a debatable question whether the removal of a judge on address could lawfully take place where the ground

alleged was an impeachable offense. In other words, there have always been those who contended that the remedy by impeachment, when available, was exclusive, and that the remedy by removal could be invoked only in cases where an impeachment would not lie. In the case of the judges who were removed for the crime of extortion, John Quincy Adams, then a member of the State Senate, placed on the record his protest, to the effect that "no judicial officer should be removed from office by the mode of an address of the two houses on the ground of offenses for the trial of which the constitution has expressly provided the mode of impeachment." And as late as 1881 or 1882, a petition was signed by prominent lawyers of the State asking that the legislature should request the opinion of the Supreme Court on the question whether the right of removal on address could be exercised for any cause except mental or physical incapacity.

As the result of a careful study of the historical evidences, Mr. Grinnell, in the article above referred to, states that "the existence of the power without restriction, as it has appeared in the constitution ever since 1780, and as it has been acted upon, seems to be justified by experience, and has undoubtedly had an influence in avoiding any serious agitation for the recall of judges in Massachusetts."

Book Reviews

STATE GOVERNMENT IN THE UNITED STATES. By Arthur N. Holcombe, Assistant Professor of Government in Harvard University. New York: The Macmillan Company, 1916. Pp. 498. \$2.25.

The State governments are the weakest link in our chain of political institutions. As compared with the federal government on the one hand, and with the administration of the best-governed modern cities on the other hand, they are cumbersome, maladroit, and unresponsive. As the author of this volume observes, "it is generally believed that State government is not very efficient and in some cases not even decent." How has this condition come to pass and what is the remedy for it? It is evident that any attempt to answer the latter of these questions must be devoid of practical value unless it is based upon a thorough historical and critical survey of the development and present-day constitution and operation of the systems of government in the several States. This is just what Professor Holcombe has given us in the admirable volume before us. It is "designed to furnish a critical analysis of the principles of State government in the United States." It is "not solely concerned with the political philosophy of American State government. It also treats of the more practical problems arising out of the growth of the functions of the modern State and the increase of its administrative activities." Beginning with a statement of the principles upon

which the governments of the original States were established, "it explains how the original forms of government have developed in response to changing conditions, how the present State governments are meeting present needs, and concludes with a brief consideration of some of the contemporary plans for further reform." In pursuance of this purpose, the author brings to bear both historical and practical criticism upon a consideration not only of the three ordinary departments of a State government, executive, legislative, and judicial, but also of the electorate as a recurring factor in the making of State institutions (including the effect of suffrage qualifications on the character of government), the political party, now generally recognized as a legal entity through the direct primary or otherwise, and the constitutional convention as an occasional but always possible organ of government.

The most significant change in the history of State government is the decline of the legislative power. Originally that department was supreme in the State. "The legislatures came to be the people's bulwarks against royal and proprietary tyranny, and after the Revolution naturally retained an undue share of the people's confidence. The result was that, except in Massachusetts, New Hampshire, and New York, the doctrine of the division of powers was not followed to the extent of making the three departments of government actually independent and co-ordinate. On the contrary, the execu-

tive was either deprived altogether of its powers of appointment, revision, pardon, and legislative control, or greatly limited in their exercise, and the control of the judiciary was also transferred from the executive to the legislature. The reconstruction of the political institutions of the original States was in the main the achievement of a tidal wave of insurgency, which sought expression through the State legislatures. The effect was to establish in practice the supremacy of the legislature, except in Pennsylvania and Vermont, where an attempt was made to work out the theory of popular sovereignty through the invention of a special organ of the popular will, the council of censors." But today the people are seeking in every way to cut down and limit the supremacy of the legislatures, and so far from regarding them as "bulwarks against tyranny," they regard them with distrust and too often with a feeling akin to disdain. The cause is not hard to discover. "The decline in the powers of the legislatures was the result of the decline of legislative prestige. As the peoples' respect for the ability and integrity of their representative bodies dwindled, their reliance upon themselves was necessarily bound to grow, unless they were to confess popular government a failure. Thus direct action by the electorate came to the support of a declining system of representative government." Convinced, apparently, that the legislatures could not be relied on as a rule to make good laws, the people have sought to limit their opportunities for making bad laws. They have transferred portions of their authority to

the executive branch of government; they have loaded the constitutions with formidable lists of prohibitions against legislative action; they have made the sessions of the legislature shorter and of less frequent occurrence; finally, they have resorted to the referendum as a means (so it was hoped) of undoing bad laws, and the popular initiative as a means (again it was hoped) of making good ones. Yet the amazing incompetence and inefficiency of the legislatures has not abated. With respect to some classes of legislative work, says Professor Holcombe, "the failure of the legislatures is to a certain extent a matter of opinion. With respect to the drafting of legislation, their incompetence is plainly recorded in the statute books. Crude, almost illiterate, legislation is constantly coming to light through the proceedings of the State courts. Laws which cannot be intended to mean what they say, and laws which mean nothing, are not uncommon. A regulation found in the road law of one State that no one shall operate a political steam roller or band wagon on the highway doubtless was put there in jest, but there is nothing funny about a provision, found in the same State, that proprietors of hotels shall keep the walls and floors of their rooms covered with plaster."

The author believes that the trial of the bicameral system in legislation has shown it to be a failure. Yet "it is not surprising that, despite the great popularity in recent years of the commission plan for the government of cities, plans for the reform of the State government by merging the legislature with the

governor and other principal executive officers into a single State commission, exercising both legislative and executive powers, have not developed to the point where they could command serious consideration or official support." Besides abandoning the bicameral system in favor of a legislature of one chamber, the author holds that five things are necessary to improve the quality of legislation; first, to increase the time allowed for the transaction of legislative business; second, to adopt rules of procedure which will insure the careful consideration of every important measure by the main body of legislators; third, to keep the membership of the legislature small, so that all the members can participate in debate and act like a single committee; fourth, to pay legislators a suitable and even generous salary; and finally, to limit the volume of legislative business. "The work which falls upon the legislatures of most of the States is too great to permit the bulk of it to be disposed of except by summary process. The legislatures are attempting to do altogether too much. Relief must be secured by the further limitation of legislative powers."

In another branch of the State government, the process has been one of decentralization and disintegration, chiefly as a result of making practically all the officers of the State government on the administrative side elective, so that, instead of a single independent and responsible executive, there is a body of executive officers, each supreme in his own department, severally and equally responsible to the people, but all independent of each other, except

as the interests of their party may tie them together. This is what our author calls a "plural executive." The effect has been weakness of the executive arm, disorganization of administration, and lack of constructive leadership. And yet, as new conditions have arisen, urgently demanding an efficient administration of the State's affairs, the obvious course of increasing the governor's powers and his control of the executive department by suitable constitutional changes has not been taken. Instead of integrating the executive power, the remedy adopted has been the creation of vast numbers of boards, commissions, and other administrative agencies. We are told that in Massachusetts "at present there are more than one hundred separate administrative agencies of the central government charged with the direct enforcement of law or with the supervision of the activities of local administrative authorities," and more than one hundred in Illinois also, and an even greater number in New York. This process of dispersing power has surely gone far enough. It is becoming increasingly evident that what the State governments need above all things else at the present time is a strong, independent, and efficient governor, who shall have power commensurate with his responsibility, and who shall be not the ruler but the leader of his State and truly representative of its people's will. "Above all," says our author, "they need a real chief executive. If the governor cannot be permitted to perform the duties of such an office, the need will have to be met in some other way."

In reviewing a work so sound and thorough, so impartial in its execution, and so generally excellent in its accomplishment, it is an ungracious task to point out blemishes. But we wish that Professor Holcombe would cure himself of the inveterate habit of using the erroneous term "judicial veto" to describe the action of a court which refuses to give effect to an unconstitutional statute. For it is precisely this mistaken notion that the courts exercise the prerogative of "vetoing" legislation which they do not like that is responsible for the greater part of the unjust and dangerous outcry against them by uninstructed persons.

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AMERICAN CITY PROGRESS AND THE LAW. By Howard Lee McBain, Professor of Municipal Science and Administration in Columbia University. New York, Columbia University Press, 1918. Pp. 269. \$1.50 net.

In our triple hierarchy of governments—national, State and municipal—it is the government of his own city which comes closest to the average American and which, under normal conditions, most intimately touches his daily life. The modern conception of the uses of government embraces something more than a negative side. It is devised and maintained not merely to protect rights and repress lawlessness. It is now recognized as a beneficent agency capable of being employed in many ways for the betterment of the lot of the citizen. And inquiry and experiment have shown that the mu-

nicipality, if it possesses a sufficient measure of autonomy and of legal power, may go far in the direction of making life easier, safer, less costly, more fruitful, and more enjoyable for its inhabitants. Cities are demanding home rule, that is, the right to make their own charters and define their own powers, and seeking and sometimes obtaining this right of self-determination, they are embarking upon the trial of various important and most interesting plans for municipal improvement and for promoting the welfare of the people. To mention only a few of these plans and projects (all of them fully discussed in the volume before us) there is the question of the municipal ownership of waterworks, street railways, lighting plants, and other public utilities; the establishment of municipal markets, stores, ice plants, and coal yards; regulating the price of various commodities, chiefly the necessities of life; abating the smoke nuisance and abolishing unsightly and flamboyant billboards; zoning the city, to keep business out of residential districts and to secure beauty and ordered symmetry in the facades of its streets; excess condemnation of land for the protection and extension of public improvements; the establishment of public parks and playgrounds, of municipal theaters and dance halls, and of community houses and recreation centers; and the "booming" of the city by advertising, exhibits, and financial aid to industrial plants.

But of the three governments, that of the city is the most severely restricted in the extent of its legal powers. Not only must the laws made

by a city (ordinances) conform to the Constitution of the United States and to that of the State, as well as to all laws of the State which are applicable to municipal corporations in general, but they must be warranted by the charter of the particular city, and they must be reasonable, impartial, and certain. And it has long been the rule of the courts that a municipal corporation possesses and can exercise only the following powers: (a) those expressly granted in its charter or in constitutional or statutory provisions applicable to it; (b) those granted by necessary or fair implication from the terms of the same instruments; and (c) those which are indispensably necessary to enable it to exercise its granted powers and effect the objects of its incorporation. In other words, the courts have construed city charters strictly. In the words of our author, "they elected to regard the city as a corporation, rather than a government; and they applied to the city the same rule of strict construction of powers that they applied in the case of private corporations."

Now it is the object of the volume before us to show how far "American city progress" in the various directions mentioned is sanctioned and sustained by the law as it now stands, taking into account constitutions, statutes, and the decisions of the courts; or, to state it differently, how far the various plans and projects for civic betterment are forbidden or impeded by the existing law. Also the author seeks to establish a rational basis for a more liberal interpretation of statutes and charters, by revising the accepted definitions of the

police power and of public uses or purposes. The work is not a legal textbook, although the decisions cited reach the respectable total of 322. It is untechnical in character, written in a clear and attractive style, free from all partisanship and special pleading, and highly informative. It should be of much interest and real value to all those who are interested in the problems of civic progress, and who wish to know what the laws permit and what they forbid, what the courts have sanctioned, and where they have felt obliged to draw the line. Though it contains no completely exhaustive discussion of any of the topics treated (which would have required several large volumes), we think the author is to be congratulated on having performed a very timely and useful piece of work, and, seeing that it is not meant for the specialist but for the general reader, that he has performed it in a very adequate and satisfactory manner.

In conclusion, it would appear that the author finds his remedy for the legal obstacles in the way of municipal enterprise, not so much in constitutional or statutory changes as in a changed attitude of the courts toward the construction of grants of municipal powers. He says: "Everybody knows how, under the construction of the United States Supreme Court, the 'necessary and proper' clause of the federal Constitution has been held to confer upon Congress enormous incidental powers. It is very nearly true to say that Congress may exercise almost any power that is remotely or indirectly conducive to the effectuation of some specific power conferred. No

other single canon of constitutional construction has had so far-reaching and continuous an influence upon the progressive evolution of the national government. It has introduced an elasticity and expansiveness without which it is difficult to see how the changing problems of our national economy could have been met. It was, of course, somewhat natural for the courts to take a different attitude with respect to the powers of a subordinate unit of government from that which they assumed toward the powers of the highest government of the land. There is certainly no reason in law, however, why they might not have applied to the powers of cities a rule of loose construction similar to that which they applied to the powers of Congress, thereby furnishing to the city precisely the same elements of elasticity and expansiveness which were needed in the struggle of the city to meet the changing problems of municipal life. It is simply a fact that the courts did not do this."

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THE PEOPLE'S GOVERNMENT. By David Jayne Hill, LL. D. D. Appleton and Company, New York and London, 1915. Pp. 287.

Within the past generation a wave of radicalism has been sweeping over the country, which has manifested itself chiefly in avowed contempt for constitutional limitations, assaults upon the independence of the judiciary, and proposals for the destruction or subversion of the system of representative government. Carried to its logical ex-

treme, this tendency would transform our political institutions and set up, in the place of government by law, government by plebiscite. Instead of a self-controlled democracy working out its will under the safeguard of irrevocable guaranties for the freedom of the citizen, we should have the democracy of the mob, as wayward and absolutistic as the rule of any other despot. Justly concerned over these manifestations of an impending change, a distinguished American citizen has set himself the task of bringing to the consciousness of his fellow-citizens a right conception of just what "the people's government" really means, and what it must continue to mean if the foundations of this Republic are to endure. This is accomplished, in the volume before us, by an historical and critical study of the nature and origin of the state, and of the source and the rightful limits of its authority, of the nature and sanction of law, and of the position of the citizen as at once the maker of law and the subject of its incidence. It is shown that the problem of reconciling liberty with government finds its solution under the regime of an adequate written constitution, respected by the people, which, while it secures the individual in his life, liberty, and property, also lays upon him that correlative duty of service and contribution which he is rightfully bound to render, not as a serf, but as a constituent unit of the state. For "law" cannot be postulated as an arbitrary command. It is empty of all ethical meaning unless it is conceived as based upon the recognition of mutual obligations. And this, between the state and the citizen as

well as between man and man. "The only safe refuge from despotism is the shelter created by human intelligence, applying to the problems of government the results of experience. The whole of civilization depends not merely upon obedience to law, but upon the renunciation by each individual of the temptation to make his own will the source of law. And this is true also of governments, in their relation to one another and to the citizen. It is certain that without power to punish disobedience to just laws and to repress violence, the state would be impotent to secure the rights and liberties of which it is the guarantor; and that measure of force, together with the means of defense against external aggression, must therefore be accorded to the state. But it is only when a state *itself* submits to law, irrespective of the extent of its power, that it can rightly claim the loyal allegiance of its citizens." It is peculiarly appropriate at this time to recur to these fundamental principles of ordered self-government and constitutional liberty, when the foundations of society seem to be in flux, and the horrid specter of Prussian autocracy, on the one side, is balanced on the other by the mournful spectacle of Russian anarchy.

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AMERICANISM: WHAT IT IS. By David Jayne Hill, LL. D. New York: D. Appleton and Company, 1916. Pp. 280. \$1.25 net.

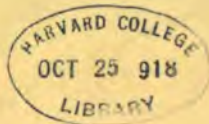
Within a generation the Constitution of the United States has fallen into disrepute. Thirty years ago the centennial of its adoption was celebrated,

amid a popular chorus of praise and acclaim and of grateful recognition of the benefits which its framers had secured for the nation and the world at large. Today, there are "none so poor to do it reverence." From every quarter come the clamorous voices of impatient criticism, of disrespect, of demand for sweeping change. It is denounced as musty, antiquated, reactionary, obstructive. There are significant references to the ash heap or the junk pile as the proper place of its approaching sepulture. A distinguished citizen, returning to this country, after a considerable term of years spent abroad in the diplomatic service, was filled with consternation by the change which had meanwhile come over the spirit of the American people with reference to the fundamental instrument of their government. He has performed a notable service in recalling to the minds of his fellow citizens, in the volume before us, the true nature of the American conception of liberty and of the state. For the founders of the American Republic made a very distinctive contribution to the political thought of the ages. They based their work upon a theory of government and of the state which was to preclude the lodgment of arbitrary power in any "sovereign," single or collective, abstract or concrete. They were solicitous to make an end of autocracy in every form, and they meant that of the mob no less than that of the crown. Their theory, as expressed in the earliest and oldest of our constitutions, was that "the end of the existence, maintenance, and administration of government is to furnish the individuals who compose the body politic

with the power of enjoying, in safety and tranquillity, their natural rights and the blessings of life." As Dr. Hill puts it: "The American idea was that there are certain rights and liberties which should never be subject to abridgment by law, and that encroachments upon these rights and liberties by a portion—even by a majority—of the people, or by any government they might establish, should be, through a superior and permanent law, declared illegal. For this there was necessary a voluntary renunciation of power in accordance with fixed principles of justice." Accordingly the Constitution was adopted as the superior and enduring law, and in its guaranties of liberty (not the donation of a prince, but the voluntary concord of the people) was effected the renunciation for all time of imperialism in its every form. This was the Americanism of 1787. This was the spirit which Edmund Burke described as "a fierce spirit of liberty." And it is to the maintenance of these principles that we owe the greatness of our nation. For, as our author truly observes: "Our Americanism is not a mere negation. It is a positive, constructive force. It starts with the idea that the human individual

has an intrinsic value. It holds that he has an inherent right to bring to fruition all his native powers, and to enjoy the fruits of his efforts. His real value lies not in what he has, but in what he is and may become; and he may become anything his capacities and his achievements may enable him to be. The contemporary reaction against Americanism erroneously assumes that individualism is egoism. On the contrary, it is the only solid foundation for our duty to respect the other man's rights. And this is the essence of Americanism as revealed in the history of its origin."

Now that we are in the throes of the struggle to destroy imperialism and to make straight the paths of popular self-government throughout the world, it is well for Americans to recur to their own first principles and to ask themselves seriously whether they mean to sanction such changes in their system of government as must eventually open the way to the imperialism of an irresponsible majority. We have a formidable enemy abroad; he can be conquered. But democracy must likewise be on guard against itself. For is it not written "a man's foes shall be they of his own household?"



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By THE NATIONAL ASSOCIATION FOR CONSTITUTIONAL GOVERNMENT

The National Association for Constitutional Government was formed for the purpose of preserving the representative institutions established by the founders of the Republic and of maintaining the guarantees embodied in the Constitution of the United States. The specific objects of the Association are:

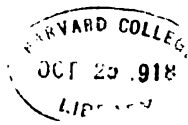
1. To oppose the tendency towards class legislation, the unnecessary extension of public functions, the costly and dangerous multiplication of public offices, the exploitation of private wealth by political agencies, and its distribution for class or sectional advantage.

2. To condemn the oppression of business enterprise,—the vitalizing energy without which national prosperity is impossible; the introduction into our legal system of ideas which past experience has tested and repudiated, such as the Initiative, the Compulsory Referendum, and the Recall, in place of the constitutional system; the frequent and radical alteration of the fundamental law, especially by mere majorities; and schemes of governmental change in general subversive of our republican form of political organization.

3. To assist in the dissemination of knowledge regarding theories of government and their practical effects; in extending a comprehension of the distinctive principles upon which our political institutions are founded; and in creating a higher type of American patriotism through loyalty to those principles.

4. To study the defects in the administration of law and the means by which social justice and efficiency may be more promptly and certainly realized in harmony with the distinctive principles upon which our government is based.

5. To preserve the integrity and authority of our courts; respect for and obedience to the law, as the only security for life, liberty, and property; and above all, the permanence of the principle that this Republic is "a government of laws and not of men."



Reorganizing the State Governments

By Emmet O'Neal

Former Governor of Alabama

(We are fortunate in being permitted to reprint the following extracts from a very able address delivered by Former Governor O'Neal of Alabama before the State Bar Association of that State in 1917. Those portions of the address have been omitted which relate to the particular constitutional provisions and arrangements of Alabama. But the remainder presents a series of constructive suggestions for the betterment of our state governments in general which display a far higher order of statesmanship than is exhibited in the easy but futile habit, unfortunately too common, of destructive criticism.—EDITOR.)

Thoughtful students of our institutions have declared that one of the most popular but ill-founded illusions of Americans is that their state governments have been successful. Americans, they assert, are inclined to believe that these governments have on the whole served them well, whereas in truth they have been ill served in their machinery of local administration and government. The weakness and inefficiency of our state governments have been largely obscured by the vigor and energy of the central government, but this weakness, while partially concealed, has not been redeemed by the efficiency of the federal government. That the state governments have failed to exercise in an efficient manner many of the primary

functions of government cannot be denied; and while we may differ as to the causes that have produced this failure, we must all agree that if it is permitted to continue, it may compromise the success of the American democratic experiment. A recent writer declared that the cause and cure of this failure constituted one of the most fundamental of American political problems. The indictment against the state governments charges, in effect, that in their financial and economic legislation the states usually have shown incompetence and frequently dishonesty; that in their relations to corporations they have been as ready to confiscate private property as they have been to confer on it excessive privileges; that their educational systems, while well intentioned, have neither been intelligent nor adapted to the needs of an industrial and agricultural democracy; that their taxing systems are chaotic, based on the old property tax, which under modern conditions is both unjust and unproductive; that while the federal government has done much, the states have done little, to ameliorate the condition of the American people; and that the lawlessness and disorder which reflect on our civilization can be traced to our dilatory and antiquated judicial methods and the inefficiency of the state governments in the enforcement of the criminal laws. That many of the charges contained in this indictment

are well founded all impartial students of our state governments must reluctantly admit. They should represent the best contemporary ideals and methods, but in truth they too often reflect a standard of popular behavior decidedly below the average.

It may be that these failures of the state governments are irremediable unless we can secure an aroused public interest and a deeper sense of civic duty among the people. Flagrant failure of a state government properly and efficiently to perform necessary duties of administration may be often due to public apathy and indifference, or to a low standard of public and private morality. But in some cases at least the failure is the result of unwise organization, and is due to the presence in the constitutions of unwise and unnecessary restrictions, limitations, and inhibitions, by reason of which the different departments of the state government are hampered or weakened in the exercise of necessary and essential governmental powers. Many of the provisions of the constitutions stand as insuperable barriers to most of the important reforms necessary to meet modern conditions, and either prevent or weaken all efforts to secure greater economy, efficiency, and vigor in the administration of the different departments of the state government. It may be laid down as a fundamental proposition that any analysis of the causes that have contributed to the partial failure of our state governments will show that they can be imputed to the lack of a centralized and responsible organization. But, as has been truly

said, whenever an attempt is made to establish a system of state government which does concentrate responsibility, serious difficulties are met. There are but two ways in which this concentration of responsibility can be brought about, either by subordinating the legislature to the executive, or the executive to the legislature.

How should the executive department be reorganized so as to increase its efficiency and capacity to best promote the public interest? We should adopt the policy of concentrating power and responsibility in the chief executive. He should be elected for a term of four years, and there should be no restriction on his eligibility to succeed himself. The veto power should be made more effective than it is in some states, by requiring a two-thirds vote to overcome the governor's negative. He should be given the power to appoint all his executive agents, as the President appoints his cabinet and all federal officials. All the heads of the different executive departments, the attorney general, the auditor, secretary of state, and treasurer, superintendent of education, and commissioner of agriculture, should be appointed by the governor and should constitute his executive council. Charged with the duty of seeing to it that the laws are faithfully executed, he should have the power to remove from office any sheriff who from cowardice, gross negligence, or incompetency permits any prisoner in his custody to be put to death by mob violence, or by any flagrant neglect of duty fails to enforce the laws. He

should have the power to suspend any tax collector for failure to perform his duty, and to make such suspension permanent for good cause, after a hearing. All vacancies in office should be filled by the appointment of the governor for the entire unexpired term. He should have the power of removing any administrative official in the employ of the state and appointing his successor.

Under the present constitutions in most if not all of the states, the governor is part of the law-making power and can recommend to the legislature for its consideration such measures as he may deem expedient. Eminent authority has held that these recommendations can take the form of a bill if the governor should so elect. In revising any constitution, it would be well to define this power more clearly, to authorize the governor, if he saw proper, to present his recommendations in the form of bills, and to give these bills precedence in the consideration of the legislature. It might be well to allow the governor to be represented in the legislature either in person or by some official whom he might designate, with full power to submit and discuss the measures presented, but without the power to vote. The provision in the constitution of Alabama which allows the governor the power to amend any bill submitted for his approval should be retained. This amendment is in the nature of a veto. It is not found in the constitution of any other state, and is one of the novel features of the Constitution of 1901, the value and wisdom of which cannot be denied.

It vests in the governor a most important and far-reaching power. It makes the governor in a sense more directly responsible for every bill enacted by the legislature. With sufficient time for consideration and investigation, there is no reason why vicious or bad laws should be enacted, if their defects can be corrected by the governor's amendment. If a bad law is passed, the governor is generally held responsible at the bar of public opinion, and hence he should be armed with this power of amendment by the provisions of the constitution, and his amendment should not be overcome by less than a two-thirds vote.

This increase of power of the executive would tend to better legislation and make him directly responsible to the people for the laws enacted during his administration. As President Wilson declared, the people look to the governor and not to the individual members of the legislature for leadership, and for the passage of such laws as the economic, political, or social condition of the state may require, and judge his administration by his success or failure in securing the enactment of necessary laws.

The constitution charges the governor with the duty of seeing to it that the laws are faithfully executed. He should therefore be vested with the power to appoint such subordinate executive agents as may be necessary to maintain order and secure a proper enforcement of the law. It has been suggested that the power of the governor to enforce the laws of the state

would be very materially increased if he was vested with authority to employ a well disciplined and well trained state constabulary, which could be quickly concentrated and which would be independent of merely local opinion. Such a force should be composed of a small body of men, subject to the orders of the governor, with full authority to investigate crimes or infractions of the law in any part of the state, with power to make arrests, vested fully with all the powers that the sheriffs of particular counties might possess. This small body of constabulary would become experts in the detection of crime, and the small expense attached would be more than compensated by the more vigorous prosecution of crime and enforcement of the criminal laws of the state. I am of opinion that officials known as the state constabulary, or state sheriffs, vested with all the power and authority of the law, under the control of the governor, would be a most effective and valuable agency in securing better enforcement of our criminal laws.

The executive department, reorganized on the lines suggested, would make the governor in truth as well as in name the chief executive officer of the state, clothed with sufficient power to guarantee an efficient and responsible administration. This program will be criticised by those who oppose all reform of the executive department from the fear of executive usurpation or tyranny. They would deprive the governor of the power to do much good for fear that he might do much harm. This is the policy which has been pur-

sued both as to the executive and legislative departments, and this denial of power and responsibility has resulted in lessening the efficiency and usefulness of both. It is the primary cause of the weakness of the state governments, and all the trend of modern thought on the subject is that there is but one remedy for that weakness, and that remedy is the very decided increase of power and responsibility in both departments. Both departments should be reorganized on the principle that they should have full power to do either well or ill. If they do ill, the power of punishment, swift and severe, still remains in the hands of the people. We are accustomed to boast of the efficiency and vigor of the federal government; and yet the President has the power to appoint not only the members of his cabinet, but all other subordinate executive agents, the marshals, collectors of revenue, postmasters, and even the judiciary. If the governor of a state possessed similar power and responsibility, he would appoint not only all the heads of the various state departments, but all the sheriffs, tax collectors, and judiciary of the state. With all the vast powers bestowed on the President of the United States and his effective control over legislation, there has never been any abuse of power or fear on the part of the people of executive usurpation or tyranny. If the President of the United States possessed no more power over the departments of the federal government than the governor of Alabama can exercise over the departments of the state, if he was denied the

authority to appoint all his subordinate executive agents, or to have behind him in the enforcement of law all the power of the government, who can doubt that the federal government would not have lasted a single generation? It would have speedily fallen from its own innate weakness. If therefore we desire an efficient and vigorous government in any state, we must clothe both the governor and the legislature with all those powers which experience has shown to be essential for a successful and vigorous administration.

Under the present system it is only the merest chance that there is any harmony or unity of action between the governor and the different departments of the state government. The attorney general, the secretary of state, the state auditor, the state treasurer, the superintendent of education, and the other heads of departments are but necessary parts of the administrative and executive machinery of the state government, and the successful administration of any governor is dependent upon their loyal co-operation and unity of action and effort; and yet all or most of these important officials may be openly hostile to the governor, opposed to his policies, and earnestly seeking to weaken or defeat his administration. Yet while the governor is alone held responsible at the bar of public opinion for the success or failure of the state administration, he is denied the right to appoint officials whose active co-operation and loyalty are so essential to the success of his administration.

With all these increased powers, it may be claimed that the election of a demagogue or some unworthy and disloyal man might do great harm to the state. This fear is based on the assumption that the people of a self-governing democracy would be unable to discriminate between some competent and worthy man and some self-seeking charlatan—an assumption which cannot be admitted by those who have faith in popular government. If the people be as lacking in powers of discrimination as feared, the harm that the demagogue might do would prove a salutary and valuable political lesson. It would be but a small price to pay for efficient and responsible government. With such an increase in executive power, the governor could properly be held responsible for the character of the administration, and he could not escape this responsibility by attempts to shift the burden on others. He could translate his policies into laws, yet he could do but little without the support of public opinion. It is to public opinion he would be forced to appeal against a reactionary legislature or one that in his opinion had betrayed the interests of the people or declined to enact legislation to which he was pledged by his election. His leadership would depend on his capacity to influence and secure the support of public opinion. With the increase of power and responsibility there would certainly be greater opportunity for service, for the display of executive and administrative ability, than ever before in the history of the office.

Turning next to the legislative branch of a state government, the guiding consideration in any reorganization of this department should be to make such changes as would elevate its standard and remove the distrust that now exists. We should not undertake to abolish, but rather to reform, our law-making bodies. Call it what you will, there must be a law-making body in every democratic government. As President Wilson once said, "a government must have organs; it cannot act inorganically by masses." If therefore the law-making power cannot be intrusted to representatives, it must necessarily be exercised by the people in their primary capacity. We must then either have a legislature or substitute for representative government direct action by the people—the initiative and referendum—a system to which more serious and conclusive objections can be made than to any other form of law-making ever undertaken. As Lord Bryce said about the initiative and referendum, "whatever may be the advantages, the demerits of the system are evident." Its adoption would be in effect the substitution of a new and untried system, contrary to our traditions and policies. Representative government would be abandoned or largely restricted, and direct government by the people substituted. A distinguished writer on American government recently said: "Such a fundamental principle and tradition as that of representation should not be thrown away unless the change can be justified by a specific, comprehensive, and

conclusive analysis of the causes of the failure of state government." The argument of the advocates of the initiative and referendum is that as their representatives have betrayed their trust, the people must resume the power they have delegated. Yet it does not necessarily follow that because many legislatures have been corrupt or inefficient or dominated by special interests, the representative system is a failure. If men who are unworthy or incompetent are elected to the legislature, who is to blame? Is no censure to be attached to the people, by whom they are voluntarily selected? Is *vox populi vox Dei*? If the people, either through indifference or apathy, select unworthy representatives, would it not necessarily follow that, through the influence of the same apathy and incapacity, they would make poor law-makers and pass many bad laws? An analysis of the causes of legislative corruption and inefficiency should not be predicated upon the old and baleful American tendency of always ascribing the failure of our state governments to some personal betrayal of trust. Is it never the people who are to blame? As a matter of fact, if the people are not to blame, then our whole scheme of representative government is a failure. But it is not representative government which is a failure, but the methods, practices, and organization we adopt to give it expression. In the reorganization of the state legislature we should remove all unnecessary restrictions upon legislative competency and increase its powers and responsibility.

But the most important and necessary reform would be a radical decrease in the membership of the legislature. The house of representatives should be composed of not over thirty members (in Alabama, for example, two from each congressional district and ten from the state at large), and the senate should contain fifteen members—in Alabama, one from each congressional district and five from the state at large. This membership of forty-five in the legislature would be sufficiently large to represent every portion of the state, and the reduced membership would increase the importance of the office and elevate the legislative standard. The election of a certain proportion of its membership from the state at large would unquestionably elevate the tone and character of the legislature. Under the present law the member must be a resident of the county he represents. Usually he acts on the presumption that his political reputation and usefulness depend upon the number of bills he can introduce and the amount of appropriations he can secure for his county. The state treasury is therefore regarded as a grab-bag, to be looted in the interest of his constituency. He is not a representative of the state, but of a county, and the interests of the county and not the state are to be first considered. If there is any conflict, his vote and influence are always to be counted on for the county. It is by the vote of his county he was elected, and upon that vote he relies for future political honors. It is safer to offend the public sentiment of the state than to

lose caste with his own constituency. It is to the county and not the state that he believes he owes first allegiance, and with so narrow a horizon from which he gets his outlook of state affairs, it is not remarkable that the state's interests are unprotected. To every governor has come the disquieting reflection that the state has few friends in the legislature. To remedy this deplorable condition is the purpose of the suggestion that a portion of both houses of the legislature should be elected from the state at large. With this, and with the decrease of membership, the payment of adequate salaries, and the removal of all unnecessary shackles on legislative action, we should elevate the tone of the legislature, the ability and character of its membership, and largely increase its powers and responsibilities. With a legislature so constituted, the public-spirited and energetic men of every community would eagerly seek legislative service and the state legislature would become what the framers of our institutions designed it to be, "a sensitive and efficient instrument for the creation and realization of opinion," which is, after all, the real purpose of constitutional government.

A fundamental reform in the organization of an ideal state government is an improvement in the organization of the judicial department and in the methods of selecting and retiring judges. This reorganization of our courts can only be accomplished by a complete and consistent scheme, by which the whole judicial power of the state shall be vested in one great court,

of which all our judicial tribunals shall be branches, departments, or divisions. Until this principle of unified state courts is recognized and carried into effect, all our efforts to secure judicial reform will prove unsatisfactory and disappointing.

The English court reform act of 1873 is a model of modernized courts. It is therefore unnecessary for us to attempt to secure reform of our courts by the introduction of legislation of an experimental nature. As it has been said, "the new system of courts created by the English Judicature Act of 1873 not only still works satisfactorily in England, but has been accepted as a model by students of reform and critics of common law institutions all over America as well." The limits of this paper will not permit an adequate summary of this act, and I will therefore content myself with quoting the conclusions of a modern critic, Professor Roscoe Pound of Harvard, applied as his general recommendation for American adoption. "The whole judicial power of each state should be vested in one great court, of which all tribunals should be branches, departments, or divisions. This court should be constituted in three chief branches: (1) county courts or municipal courts, (2) a superior court of first instance, and (3) a single ultimate court of appeal. The first should have exclusive jurisdiction over all petty cases. There should not be a separate judge for each locality. Instead, all the courts with petty jurisdiction should in the aggregate constitute one court, or a branch of the great

court, but this branch of the court should have numerous local offices, where papers may be filed, and as many places for hearing causes in each county as the exigencies of business may require. The second branch would be a superior court of first instance, with a general original jurisdiction at law, in equity, in probate and administration, in guardianship and kindred matters, and in divorce. It should also have general jurisdiction. It should have numerous local offices where papers may be filed, and at least one regular place of trial in each county. Some high official of the court should be charged with supervision of the judicial business of the whole court, and he should be responsible for failure to utilize the judicial power of the commonwealth effectively. And the third great branch of the court would be a single court of appeal to which causes must go directly for review from the county courts or from any division of the superior court. All the judges of the commonwealth should be judges of the whole court."

The plan proposed is simple; it is neither academic, experimental, nor revolutionary. It has been in successful operation in England since 1873, and in the unified municipal courts of Chicago, whose business organization secured the utmost economy, efficiency, and impartiality in the administration of law in the second largest city in the country. This plan was endorsed by a special committee of the American Bar Association in 1909, and has been adopted in principle by the American Judicature Society. The basic prin-

ciple of the reform proposed is the unification of the entire judicial system of the state, and the power given the chief justice to marshal all the judicial forces of the state to meet the pressure of business in any branch of the court or in any part of the state. It contemplates complete and thorough supervision of the business of all the courts by some one in high authority, such as the chief justice, with power to make reassignments or temporary assignments of judges to particular localities as the state of judicial business, vacancies in office, illness of judges, or casualties might require, and with power, subject to general rules, to transfer causes or proceedings in any court for hearing or disposition according to the condition of the dockets, and to see to it that all the judicial power of the state is effectively utilized. The same general supervision which the chief justice gives to the whole court is exercised for each branch and each division in each locality by some other officer, who is especially charged with the duty, and is responsible for the efficient and businesslike conduct of the affairs of the courts under his control and the disposition of causes upon the dockets. The plan of the American Judicature Society contemplates that the states should be divided into, say, six or seven circuits, with a corps of judges, one circuit judge made chairman for the circuit, with complete power to regulate the assignment of causes to the different courts in his circuit and to designate that judge who might be most fitted for the duty in each branch of the court. Such chair-

man would also have power to transfer causes from one division of the court to the other. All the plans seek to secure a thorough business administration of the courts, and to overcome the decentralizing conditions which now exist, by which the clerks and other officials of each court are practically independent functionaries, over whom even the judge of their own court has but little control. It is important that the legislature should not undertake the formulation of detailed rules for the business administration of the courts, but should only lay down general principles and leave it to the court to regulate details and to alter and improve the rules as the problems are met and the best solutions for them ascertained.

There is another consideration of controlling importance in favor of a unified and thoroughly organized system of courts with a simplified practice, and that is the decrease in the number of judges and in the expenses of the judicial department. The committee of the American Bar Association summed up the advantages of such an organization of the courts, of judicial business, and of the clerical and administrative work of the courts, as follows: (1) It would make a real judicial department. The several states have courts, but they do not have any true judicial department. (2) It would do away with the waste of judicial power involved in our present system of separate courts with hard and fast personnel. Where judges are chosen for and their competency is

restricted to rigid districts or circuits or courts, it is a familiar consequence that business may be congested in one court while judges in another are idle. The judicial department should be so organized that its whole force may be applied to the work in hand for the time being, according to the exigencies of that work. (3) It would do away with the bad practice of throwing causes out of court to be begun over again in cases where they were brought or begun in the wrong place. They may be transferred simply and summarily to the proper branch or division, or rules may provide that the cause be assigned at the outset to the place and division to which it belongs, and no question of jurisdiction will stand in the way. (4) It would do away with the great and unnecessary expense involved in the transfer of causes, obviating all necessity of transcripts, bills of exceptions, certificates of evidence, and the like, and permitting original files, papers, and documents to be used, since each tribunal, as a branch or division of the whole court, may take judicial notice of all files, papers, and documents belonging to the court. (5) It would obviate all technicalities, intricacies, and pitfalls of appellate procedure. An appeal would be merely a motion for a new trial or for modification or vacation of the judgment before another branch of the same court. It would require no greater formality of procedure than any other motion. (6) It would do away with the unfortunate innovation upon the common law by which venue is a place where an action must be begun, rather

than a place where it is to be tried, so that a mistake therein may defeat an action entirely, instead of resulting merely in a change of place of hearing. This innovation is especially unfortunate when it is applied to equity cases where originally there was no venue. If all tribunals are parts of one court, there need be nothing beyond a transfer of the cause. All proceedings up to the date thereof may be saved. (7) It would obviate conflicts between judges of co-ordinate jurisdiction, such as unhappily obtain too often in many localities under a completely decentralized system, which depends wholly on good taste and sense of propriety of individual judges or on the slow process of appeals to prevent such occurrences. As most of our courts are organized at present, there is nothing to prevent any judge from trying any cause pending in the court he pleases, however foreign to the work he and his colleagues have agreed he shall attend to. (8) It would allow judges to become specialists in the disposition of particular classes of litigation. The prevailing system of rotation is unfortunate. Usually, where there are a number of judges, they take up in rotation civil trials with juries, equity cases, and criminal cases. By keeping a judge continuously occupied in one class of cases, he becomes thoroughly familiar therewith, and this specialization was the real advantage of the separate courts of law and equity. Instead of separation between law and equity in procedure, the desirable thing is separation in administration. The way to obtain this is to or-

ganize the court in such a way that the judges may be assigned permanently to the work in which they prove most fit. (9) It would bring about better supervision and control of the administrative offices connected with judicial administration, and make it possible to introduce improved and more business-like methods in the making of judicial records and clerical work of the courts.

The common law power of judges should be restored. The reason why trials consume so much more time in this country than in England is largely due to the fact that we have withdrawn from the courts their common-law powers to exercise control over the trial of the cause. Clothed with the power vested in judges by the common law, a judge upon our bench could restrict counsel to the argument of relevant and material questions, could promptly overrule and discourage technical objections, could prevent useless and unnecessary consumption of time by the introduction of immaterial and irrelevant evidence or by the argument of questions as to which the court has a clear and decided opinion, and could without the fear of reversal exercise the necessary authority so essential to the prompt and efficient administration of justice. With the present legislative restrictions, our judges are denied their common-law power of summing up the evidence, and thereby presenting the issue clearly and intelligently to the jury, but are converted into mere presiding officers, whose principal duty is to confuse the jury by submitting exhaustive presentations of legal questions. It has been claimed that the

restoration to our state judges of their common-law powers would result in abuse or judicial tyranny; but the prompt and impartial administration of the law which has characterized our federal courts, as well as the courts of England, conclusively shows that these fears are groundless. Increasing the power of our judges by restoring to them rights which have been exercised for centuries by the *nisi prius* courts in England would tend to elevate the standard of our courts and largely increase their efficiency and result in promoting a more speedy and impartial administration of the law.

The Hon. Elihu Root, president of the American Bar Association, speaking of the statutes found in many states and quite recently urged upon Congress, prohibiting judges from expressing any opinion to the jury upon questions of fact, makes the following convincing reply: "From time immemorial it has been the duty of the court to instruct juries as to the law and advise them as to the facts. Why is it that by express statutory provision the only advice, the only clarifying opinion and explanation regarding the facts, which stand any possible chance to be unprejudiced and fair in the trial of a cause, is excluded from the hearing of the jury? It is to make it certain that the individual advantages gained by having the best lawyer shall not be taken away. It represents the individual's right to win, if he can, and negatives the public right to have justice done. It is to make litigation a mere sporting contest between lawyers and to prevent the referee from interfering

in the game. The fact that such provisions can be established and maintained exhibits democracy's tendency to yield support to the human interest of the individual as against the exercise of even its own power by its own representatives and for its own highest purpose. The evil results of the absurdly technical procedure which obtains in many states really come from intolerance of judicial control over the business of the courts. A clearer recognition of the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own procedure, would tend greatly to make the administration of justice more prompt, inexpensive, and effective, and this recognition must come from the bar itself."

As to the personnel of the judiciary, three plans have generally prevailed in this country for the selection of judges, appointment by the governor, appointment by the chief justice, and election by the people. Since the introduction of the primary system of nominations, this latter method has not proven very satisfactory, in Alabama at least, and there has been a steady decline in the standard of the courts. Under the convention system, which had its origin in our representative theory of government, the lawyers constituted a very considerable proportion of the delegates, and on account of their peculiar knowledge of the fitness of the applicants, a higher class of judges were selected. One advantage of the convention system was that there was a sense of responsibility on the part of

the delegates, which unfortunately is too often lacking with the voter under the primary nomination plan. The necessary result is that in casting his ballot under the latter system, friendship, locality, personal obligations or prejudice, solicitation or activity of the candidate, generally exercise a controlling interest. Under the convention system the office frequently sought the man, whereas under the primary plan no man can be nominated who does not actively seek the nomination. The consequence is that under the primary plan we are confined in our choice to those active politicians who seek the nomination, and the candidate who is the best mixer, who conducts the most expensive press bureau, who employs the largest number of workers and agents, and who is most industrious in seeking votes, or who can appeal to local prejudice or passion, has the best chance of winning, regardless of qualifications. The test of fitness is no longer knowledge of the law, but the possession of those qualifications which enable one to become a successful ward politician. Knowledge of human nature, of influences that control human action, is more important than profound learning of the law. The tricks of the politician count for more than the learning of a Story or a Marshall.

What, then, is the purpose of an appointment or election but to put into office that man who by reason of his legal knowledge, his impartiality and judicial temperament, independence and high character, guarantees a firm, vigorous, and impartial administration

of the law? Whatever system, whether by appointment or election, will accomplish these results is the system we should adopt. The primary system and the popular election of judges do not tend to create an independent judiciary. On the contrary, the tendency is to incline the judge to yield to popular passion and prejudice, to be swayed by every passing breeze of popular sentiment, and to allow his own reelection to exercise a controlling influence on his official conduct. Fortunately there are many judges who rise above such grovelling influences, and who do their duty even though the thunder of popular disapproval light on their untterrified brows.

The latest conclusions of the American Society of Judicature suggest some very wise solutions of the evils of the present system, and are worthy of serious consideration. Under their plan, the chief justice of the highest court of the state and of the unified courts of the state should be chosen by the entire electorate of the state, for a term "neither too long to make him unmindful of public approval nor too short to make the office worth the strain of repeated campaigns," and he should be given the absolute power of selection and appointment of all the other judges of his court whose positions become vacant during his term of office. It is further suggested by their plan that at stated periods, say at the expiration of three years, of nine years, and of eighteen years from the date of the appointment of each of these judges, the question should be submitted to the entire electorate, with refer-

ence to the judges who have been sitting for those periods respectively, "shall the judge be retained; yes or no?" If a majority of the voters vote in the negative, the judge is rejected, and the chief justice appoints some one else to fill the vacancy. This plan overcomes one of the chief evils of the present system. No reason can be shown why a judge who is satisfactory should be compelled to submit to a competitive race to retain his position. Whether appointed or elected, the sole question to be submitted to the electorate at the expiration of his term is: "Shall John Doe, who has served continuously as judge for . . . years, be retained; answer yes or no." Then, after being retained for two or three terms by the express consent of the voters, the judge is to be continued in office till the age of retirement without further elections. This plan gives the people the right to recall a judge who is unsatisfactory, but until he is recalled there is no vacancy in his office, and even if the present system is continued, candidates seeking judicial positions must wait until the people have declared that the sitting judge is unsatisfactory and shall not be retained, before they can seek the office.

The campaign rivalry and unseemly contests between judges on the bench and candidates for their positions, which under our system have done so much to impair the integrity and independence of the judiciary and to lower the standard of the judicial office, would be ended. A lawyer's reputation is largely local. The qualities which make a successful advocate and

attract public attention are not necessarily those qualities which equip a lawyer for a judicial office. If it is difficult for the bar, then how much more difficult is it for the public at large, to make a wise and discriminating choice between candidates for judicial positions. The judge on the bench should not be retired unless his services are unsatisfactory, and until the people de-

termine by an election that sole question, he should not be forced to enter into a competitive contest to retain his seat. The mass of the people, by whom the judges are elected in their competitive contests, are confessedly ignorant of the fitness or unfitness of the candidates; but they can readily decide whether the sitting judge has been satisfactory and should be retained.

War Time Property Rights Under the Constitution

By Ira Jewell Williams

Of the Philadelphia Bar

To the extent to which the Constitution so provides, the citizen's rights are of course less in time of war than in time of peace. Thus, a soldier may be quartered in the house of a citizen "but in a manner to be prescribed by law" (Amendment III). A citizen may be held without presentment or indictment "in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger" (Amendment V). The writ of habeas corpus remains unaffected by the mere existence of a state of war, unless our territory is invaded. "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it" (Art. I, Sec. 9). The Constitution contains many other references to war, but nowhere else specifically limits the rights of citizens or purports expressly to lessen or vary the protection of the fundamental law.

In Art. I, Sec. 8, it is provided that Congress shall have power, among other things, "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of officers and the authority of training the militia according to the discipline

prescribed by Congress." It is also provided that "no state shall without the consent of Congress....keep troops or ships of war in time of peace" (Art. I, Sec. 10). "The President shall be commander in chief of the army and navy of the United States and of the militia of the several states when called into the actual service of the United States" (Art. II, Sec. 2). He shall have power to make treaties, with the concurrence of two-thirds of the senators present (Art. II, Sec. 2). "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort" (Art. III, Sec. 3). "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed" (Amendment II). But the fundamental rights of the citizen, except to the extent that the Constitution provides otherwise, remain the same in war as in peace. To what extent does the Constitution, fairly construed, either expressly or by necessary implication limit these rights?

Following the enumeration of the war powers comes the provision giving the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." As a sovereign nation the United States, having power to wage war, may exercise every power necessarily or reasonably incident to the war power, to the end that the nation may be preserved. To this extent we have a "fighting Constitution." That immortal document was not

penned by pacifists, but breathes, like the Declaration of Independence itself, the noble spirit of self-sacrifice and manly devotion to country, to justice, and to the sacred cause of freedom. Our forefathers saw life steadily and saw it whole and believed in the right and in the duty to fight for it.

Doubtless a wise despotism would be the most efficient war machine; and in matters purely military this may well hold good. But in times of war military power and political power remain distinct within their respective spheres. Even in the domain of military operations, the commander in chief is not an autocrat vested with absolute and unrestrained power. He is answerable according to the rules of war and the law of nations. He is not a tyrant or despot, but merely the directing head of the military majesty of his nation, which, out of regard for its own self-respect, has placed many limitations on his power. He may under the pressure of military necessity order the destruction of property which interferes with the development of his own plans or which may be helpful to the evolutions of the enemy. (Even the mayor of a city may in certain cases in the exercise of the police power tear down buildings to prevent a conflagration and public catastrophe.) The commander in chief may temporarily restrain the liberties of those in the zone of military operations. But he is rigidly bound by the Regulations of the United States Army, which embody all the laws of war. And the laws of war are clear in their protection of the rights of private property.

The Hague Convention contains, *inter alia*, the following: "Neither requisitions in kind nor services can be demanded from localities or inhabitants, except for the needs of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to imply any obligation upon the population to take part in military operations against their country. These requisitions shall only be demanded on the authority of the commander in the locality occupied. Supplies in kind shall as far as possible be paid for on the spot; if not, the fact that they have been taken shall be established by receipts." Article 46 of the Hague Convention provides: "Family honor and rights, the lives of persons, and private property must be respected. Private property cannot be confiscated." Hague Resolution Article 52 provides: "Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible." Our own Supreme Court has said: "The government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war." *U. S. v. Klein* (1871) 13 Wallace, 128, 137; *Lamar v. Brown* (1875) 92 U. S. 194. The landing orders of Rochambeau drawn up by him on board the *Duc de Bourgoyne* contained the following: "It is forbidden to take a bit of wood, a sheaf of straw, any kind of vegetables, except amicably and in paying." Upon the oc-

cupation by the Japanese of Dalny-Aruga, this was one of their regulations: "Private property seized will be restored and the question of indemnity settled when peace is re-established. For every article of private ownership seized by the army a certificate will as soon as possible be furnished." In "*Friends of France*," a book published by the American Field Service in 1916, it is said that the French are especially rigorous in their respect for private property in occupied territory, and that not even a tree in an out-of-the-way place could be cut down for fuel except after authority obtained and proper indemnification. Even the Germans, who have violated every rule of war and dictate of humanity, have made it a practice in many cases to give receipts for property, such receipts calling for payment three months after the close of the war.

So we find that the military forces of the nation, under the stress of actual combat, must respect the rights of private property even of enemies. Now while the military forces in the field are controlling their conduct by the requirements of law, how may the political powers at home, regulating the affairs of the 100,000,000 who are not engaged in actual conflict, proceed to act? Are they to invoke the maxims "*inter arma leges silent*" and "*necessity knows no law*?"

The nation is waging this war—this righteous, this necessary, inevitable war. It is the duty of those in control to see to it that, in exercising the political power of the nation, none of the "inalienable rights of man, life, liberty,

and the pursuit of happiness" be infringed. If I am of draft age, I may be conscripted, as all others in like case; that authority is based upon the right "to raise and support armies." If I am engaged in a business, e. g., distilling whisky, which Congress deems to be contrary to the general welfare, I must stop that business; and so must others in like case. And I may be taxed on my property and my earnings and my income; but such taxes must be "uniform throughout the United States," as well in war as in peace times. Enemy property may not be confiscated. Is citizen property less sacred? To those who have obtained it by their own efforts it represents the honest crystallization of their self-denying pursuit of happiness, the anchor to windward against future adversity. The answer is found in the splendid words of the Fifth Amendment: "No person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." To those furtive or unconscious worshippers of German "nothrecht" whose secret motto is "necessity knows no law," and who would ruthlessly trample under foot the private rights of individuals in order to make a political showing of efficiency, it cannot be said too plainly or too vigorously that the safety of the public does *not* require the ignoring or confiscation of private rights, and that honesty and decency require that the nation as a whole pay the bills, and on the basis of just compensation for private property taken for public use.

Is it necessary to cite authority for principles of justice so obviously fundamental? In *Ex parte Milligan*, (1866) 4 Wallace, 118, it was said: "The Constitution of the United States is a law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government within the Constitution has all the powers granted to it which are necessary to preserve its existence, as has been ably proved by the result of the great effort to throw off its just authority. . . . This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded and the calamity of war again befell us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they founded, be its existence long or short,

would be involved in war; how often or how long continued human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this and other equally weighty reasons they secured the inheritance they had fought to maintain by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the judiciary disturb, except the one concerning the writ of habeas corpus."

In the case of *Mitchell v. Harmony* (1851), 13 Howard, 115, Chief Justice Taney said: "There are occasions where private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy, and also where a military officer charged with a particular duty may impress private property and take it for public use. Under these circumstances the government is bound to make full compensation to the owner, but the officer is not a trespasser. But in every case the danger must be present or impending, and the necessity such as does not admit of delay or the intervention of the civil authority to provide the requisite means. It is impossible to define the particular circumstances in which the power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this

necessity, the state of facts as they appeared at the time will govern the decision, because the officer in command must act upon the information of others as well as his own observation. And if, with such information as he can obtain, there is reasonable ground for believing that the peril is immediate or the necessity urgent, he may do what the occasion seems to require, and the discovery that he was mistaken will not make him a wrongdoer. It is not enough to show that he exercised an honest judgment and took the property to promote the public service; he must also prove what the nature of the emergency was, or what he had reasonable grounds to believe it to be; and it will then be for the court and jury to say whether it was so pressing as to justify an invasion of private right. Unless this is established the defense must fail, because it is very clear that the law will not permit private property to be taken merely to insure the success of an enterprise against a public enemy. It can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate but it cannot justify."

And to the like effect is *United States v. Russell* (1871) 13 Wallace, 628, as follows: "Where such an extraordinary and unforeseen emergency arises in the public service in time of war, no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the imme-

diate public exigency; but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed."

Is there any reason why these sound principles of justice should now be placed in abeyance? Indeed, is there any excuse except that human rights in property are no longer entitled to adequate protection? As has been well said by Judge Orlady, when President of the Pennsylvania Bar Association, "the demand of demagogic orators and writers is insistent today that possession of property implies wrong-doing, and the people are taught to tear at constitutional foundations in the name of social justice." And so we are told much of "profiteers" and of taking the "pay" out of "patriotism," and we know that economic ignorance may be exalted in high places and determine policies which, if unwise or unsound, may make for the woe of all mankind. A great editor (Mr. George Harvey, *North American Review*, November, 1917) has wisely said: "More particularly in a time of tense feeling than at any other does it behoove us to keep our heads on our shoulders and our feet on the ground, lest in our wrath, however righteous, we build precedents likely to crumble fundamentals and to plague posterity." Without anarchy or the red terror, have we been drifting

towards Bolshevism? Have we, under cover of a really non-existent war emergency, been sapping at the foundations of liberty itself?

The American people are united in the holiest crusade of the ages, and are ready to sacrifice everything upon the altar of righteousness. They are even willing for the time to forego a large part of their constitutional rights. The war must be won, for the sake of all that is sacred and that we hold dear. The sole question is, how best can this be done? War is becoming in large part the same sort of task that is so well performed by many of our captains of industry. Let us put in charge, with absolute power of control, our biggest and best business men, not on advisory boards subject to the convenience or veto of others, or obliged to report to and overcome the prejudices of men in high position who have never succeeded in big business for themselves, and who could perhaps never stand the test in private life, but in actual and complete control, themselves in the highest places within the gift of the President, honored and trusted by him as the saviors of the country.

And by what principles will these men be governed? Win the war, and win the war quickly and surely. There never was a moment in the world's history when time was so much "of the essence." This is no time to haggle over prices, at the expense of the element of time. Every day means thousands upon thousands of lives. The quickest way is the best. There is no time to lose, and if there were, it is at the expense of the flower of the Allied

racess. We must be sure to be right, but it is a military maxim, applicable now, that it is more important to do quickly one of several substantially sound things than to wait to figure out the ideal tactics. Every man who is delaying a decision or permitting bureaucracy to triumph over patriotism, should have before his eyes a picture of the scores of dead and wounded because of the precious day or week lost through his inaction. Procrastination, professional pride, the obstinacy of unaccustomed power, like strong wine to weak heads, the dalliance with theories and phrases instead of facing facts in a world of things as they are—these are some of the things that may lose the war. God grant it be not so! There is no living human being who has not a stake in the righteous ending of this war, so as to make the world safe for decency and fair play and humanity. This is the first and paramount consideration. And there is no one so poor and humble as not to have a vital interest in hastening the end of the war, the righteous ending of the war, by every week and day and hour. And this can be done only by an America full-armed, united, and determined. Every man must help, but the duty is especially upon those in high position to leave no ground for doubt that every consideration of policy or personal advantage has been thrown to the winds, and that our only watchwords are "America" and "Victory."

What should be the attitude of these giants of affairs, these supermen of commerce, who have gained the palm and earned the crown by dint of toil

and sacrifice and power and character and wisdom, and whom we are now calling to the nation's seats of the mighty? Except where emergency requires otherwise, in order to save precious time, they will respect and conserve the rights of all. As they have achieved by faith and not by doubt, they will believe in their fellow Americans of all sorts and conditions, and will have confidence in all men, even the successful and the thrifty. As they have been accustomed to desire their own rights to be regarded, they will continue to regard the rights of others. We shall have an end of such price-fixing as by reducing production tends to aggravate an already forced and unnatural market. We shall have consumption regulated and decreased wherever possible and production stimulated instead of restricted. We shall have a sensible recognition of the facts that the country as a whole must pay for the war; that no citizen or group of citizens may be fairly called upon to pay a disproportionate share merely because he or they happen to own certain governmental necessities; that private property may not even in war time be taken for public use except for just compensation, which means market price, not an arbitrary figure fixed by bureaucrats out of their inward consciousness.

"Except where emergency requires otherwise, in order to save precious time, they will respect and conserve the rights of all." For if the liberty for which our fathers and brothers and sons are fighting and dying is to be preserved for us, for the glorious

golden age of peace on earth we must see to it now that the altars are not torn down. By eternal vigilance we must retain our consciousness of and belief in and respect for a government of fundamental law. We must preach the doctrine that at all times, even under the scourge of war, all governmental dealings with private industry, rights, and property must conform to the Constitution; under processes perhaps more summary and direct, but still in harmony with the fundamental law. In no other way will the future be made secure for our children and our children's children. For in all the horror of the present we must look forward to the ideal of a world redeemed by heroism and devotion and sacrifice, when there shall be an end of the gross abuse of the power of organized government, the millennium of a re-birth

of the Rights of Man in international justice and a new reign of law.

If we are asked to waive by tacit consent a part of our constitutional rights during emergencies caused by war, let us all the more cherish our vow to support, maintain, and defend the Constitution. Are things being done which are justified (if at all) by the plea of war emergency? If so, by all means let this be recognized, let the truth be known, and let us look forward to the ideal of a return to the norm of peace, a government of laws not men, with all our ancient liberties wholly restored. For even while fighting to save the life of our nation and the soul of the world, we are still free men, living under the government of a free state, and under the protection of that greater charter of our liberties, the Constitution of the United States.

A Study of the Bicameral System in Legislation

By the Editor

Is it of any advantage to a state to have its legislature divided into two houses? If it is a fact, as many assert, that the state governments are the weakest link in our chain of political institutions, is this attributable in any degree to the joinder of two bodies in the making of the laws? Could a legislative body composed of a single chamber be depended upon to frame better laws and to do it more efficiently, more expeditiously, and less expensively? How did we come to adopt the bicameral system, and are there any reasons for continuing it? Are there not stronger reasons for abandoning it? If a unicameral legislature would be good for the states, would it not also be good for the United States?

These questions are not of merely academic interest. They are of practical importance. For there is a strong and growing agitation in favor of abolishing senates or upper houses in the state legislatures and even in the Congress. For example, within the last five years the governors of four states (Minnesota, Kansas, South Dakota, and Washington) in their annual or inaugural messages have definitely recommended constitutional amendments to create a small one-chambered legislature. In Ohio, high officers of the state government have proposed the same change, with the apparent approbation of the press. Proposals to do away with the state senate have been submitted to the people, at

elections held within the last few years, in Arizona, Arkansas, Oklahoma and Oregon. In each case they have been defeated. But in Arizona and Oregon the proposal had the support of just about one-third of the voters; and there is reason to think that, in other states as well as these, the sentiment in favor of a radical reconstruction of the legislature has gained much strength since the elections referred to. In the constitutional convention of Massachusetts in the summer of 1917, an amendment to the constitution was proposed by Mr. Matthew Hale for the abolition of the senate and the vesting of the entire legislative power of the state in a single chamber of twenty-five members. Bills for the submission of constitutional amendments of almost exactly the same import have been introduced in the legislatures of numerous states, for instance, in 1917, in California, Washington, and Nebraska. As to the last-named state, we read in a well-informed journal: "Sentiment for a single-house legislature is growing rapidly in Nebraska. The last two or three state senates have converted thousands of voters to the proposition. The Farmers' Co-operative and Educational Union, with a membership of 35,000 in the state, unanimously approved the abolition of the state senate at its state convention, January, 1918."

Furthermore, it should not be forgotten that the Socialist party in this country has persistently included in its

platform a demand for the abolition of the United States Senate, coupled with a proposal to deprive the President of the power to veto acts of the unicameral Congress and the courts of their right to pass upon the constitutionality of its enactments. So also, the new "reconstruction program" of the British Labor party declares that the party "stands for the complete abolition of the House of Lords, and for a most strenuous opposition to any new second chamber, whether elected or not, having in it any element of heredity or privilege." In America, the question has not yet been made a party issue (except by the Socialists), but it is emerging into the sphere of practical politics, and the idea of setting up legislatures of one chamber only, instead of the present system, is received with approval by many influential journals and magazines, as well as by many men of knowledge and experience. In speaking of the propaganda initiated by the state governors, as mentioned above, and followed up by the press, Mr. Richard S. Childs (in the *National Municipal Review*, November, 1917,) remarks that "in all this discussion the significant feature was the almost utter absence of ridicule or of defense for the existing institutions of government. People were not shocked. Editors did not jeer. Consequently we are probably nearer to bold changes than we thought, especially now when there are half a dozen state constitutional conventions in sight."

Any intelligent discussion of the merits of this question should be based on an historical and critical study of

the bicameral system in this and other countries. The limits of this article do not permit of exhaustive detail in such a study. But even the data which we are able to include may deserve thoughtful attention. For if it shall be shown that the principle of joining two houses or chambers in the making of the laws is of considerable antiquity, has been adopted by almost all the most advanced and populous self-governing countries and constitutional monarchies, has been rejected by none that have tried it, and has been put in force by several after previous experiments with the other principle, then surely it is not too much to say that it has strong presumptions in its favor and that the burden of proof is plainly upon those who would overthrow it.

To begin with the convention of 1787, which framed the Constitution of the United States, the "Virginia plan," proposed by Randolph, contained as its third resolution that "the national legislature ought to consist of two branches." When the Virginia plan was considered in committee of the whole (May 31) this resolution, according to Madison's journal, "was agreed to without debate or dissent, except that of Pennsylvania, given probably from complaisance to Dr. Franklin who was understood to be partial to a single house of legislature." On June 19, in committee of the whole, a motion was made that the committee reject the New Jersey plan (offered by Paterson) and report to the convention instead the resolutions of Randolph. This was carried by a majority vote,

seven states voting in the affirmative, three (New York, New Jersey, and Delaware) voting "no," and the vote of Maryland being divided. As Madison explains, "this was in fact a question whether Mr. Randolph's propositions should be adhered to as preferable to those of Mr. Paterson." In other words, it did not indicate a division of opinion on the question whether there should be one or two houses. But on June 21st, when the question was before the convention on the report of the committee, this specific resolution was adopted on the same vote as in the committee, that is, seven to three with one state divided. Abraham Baldwin, a member of the convention, in giving an account of its proceedings to a friend, stated that "they were pretty unanimous in the following ideas that the national council should consist of two branches, viz., a senate and representatives." On the other hand, Luther Martin, in his elaborate address to the Maryland legislature, asserted that there was a "diversity of sentiment" on this point, and it is easy to infer from his remarks that he personally was in the minority and that it was his objection which caused the vote of Maryland to be divided. When the Constitution was before the states for adoption, Judge Story tells us that "it does not appear that this division of the legislative power became, with the people, any subject of ardent discussion or of real controversy. If it had been so, deep traces of it would have been found in the public debates, instead of a general silence."

A little earlier, however, it would appear, the subject had been warmly debated. The same author recites: "We are told that at the first formation of our state constitutions it was made a question of transcendent importance, and divided the opinions of our most eminent men." Predilection for a single law-making body was one of Benjamin Franklin's strongest political opinions, and it was almost wholly in consequence of his preference and influence that the first constitution of Pennsylvania, adopted in 1776, provided for a legislative assembly of only one house. But the bicameral system came in with the constitution of 1790. The first constitutional convention in Vermont was held in July, 1777, and remained in session only six days, during which time, nevertheless, as it reported, it "did compose and agree unanimously on a constitution." This, the first constitution of the state, was very closely modeled upon that adopted in Pennsylvania the preceding year, and which had been recommended to the inhabitants of Vermont as a model by Dr. Thomas Young. It included Franklin's idea of a legislature of one chamber. Proposals to add a senate to Vermont's legislature were rejected by conventions in 1793, in 1813, and in 1827, but finally adopted, by a very close vote, by a convention in 1834. The first constitution of Georgia (1777) did not provide for a true second house or separate branch of the legislature, but for an executive council elected by the assembly from among its own members. In 1789, however,

Georgia's legislative system was brought into harmony with that of the other states. The original constitutions of all the rest contained provisions for a legislature of two houses, and long before the middle of the nineteenth century it had become established as a fixed principle of American constitutional practice. It is worthy of remark, in passing, that the settlers in the territory of Oregon met in a sort of mass meeting to devise some form of government for themselves, in 1846, Congress having up to that time neglected to provide for them, and put forth a series of "organic laws" including, among other things, provision for a legislature. Naturally and instinctively they organized it as a body of two houses.

There is no need to recount the parliamentary history of England. But since a proper study of the question in hand must involve some consideration of the composition of upper houses and their influence in legislation, the reader may be reminded that the English peers in the House of Lords are "temporal" and "spiritual," the former sitting by hereditary right, and the latter (the bishops and archbishops) for life and by virtue of their ecclesiastical office. The representative Irish peers are elected for life by their fellow peers, and the Scotch peers are elected in the same way but only for the term of each parliament. There was a period in English history, 1649 to 1653, when a House of Commons ruled absolutely alone, without either King or lords; but after four inglorious years of incompetence, shuffling,

and despotism, it was dissolved by Cromwell as a thing beyond endurance. Of this episode it has been said: "The commonwealth's men set aside the King and lords, and proposed to establish a new order of things. In thus reorganizing the government, they ran counter to the political instinct of the nation, and the ultimate failure of their scheme was therefore a foregone conclusion. The King, lords, and commons stood for the primitive King, council, and assembly. Any other form of government failed to meet the instinctive demands of the nation and insure political stability. Cromwell at last appreciated that there was no hope for the commonwealth except in a return to the ancient threefold division of power, which was effected through the institution of the 'other house' and the office of Lord Protector." (Crane and Moses, "Politics," p. 73.) As to the influence of the upper house in the British Parliament, particularly since the recent curtailment of its powers, Mr. Gilbert Murray (in the *North American Review*, September, 1917) has observed: "The House of Lords does feel the weakness of its position. It knows that it is not representative, and that if it really thwarts the people's will seriously, its days are numbered. It does not claim equal power with the Commons. It claims a power of delay. Normally it accepts measures passed by the House of Commons, but it claims, in Lord Lansdowne's words, the right and duty 'to arrest the progress of such measures whenever we believe that they have been insufficiently considered and that they are not in ac-

cord with the deliberate judgment of the country.' If the country shows that it does approve the said measures, the House of Lords immediately retires. The Senate of the United States would hardly be so modest, nor yet the French Senate."

Under the constitution of Canada (British North America Act, 1867) the legislative power is exercised by a parliament consisting of an upper house or Senate of 87 members, who are nominated for life by the Governor-General, that is, in reality, by the ministry, and a House of Commons duly elected by the several constituencies of the various provinces in proportion to the relative population of each. A senator must be 30 years of age and must own at least \$4,000 worth of property above all debts. As to what the Canadians themselves think of their Senate and of its utility and influence, we are told by an authoritative writer on the institutions of his country: "When the Senate is of the same political party as the Commons, very little is heard of a movement to abolish or amend it. When it is troublesome, by refusing to carry government measures, a cry is raised by some for its abolition or amendment, but this is not continuous or influential. While there are a few who consistently urge such a scheme, however the Senate may be constituted, they are only a few. In most cases it is the political creed of the voter which determines his view of the usefulness of this second chamber, and in any case we escape the undemocratic result of a second chamber being always of one political party." "There

does not seem to be a real movement of any importance for the abolition of the Senate. Logically it is hard to find an excuse for its existence; but we are not a logical people. If an institution works well, or even does no great harm, we are likely to leave it alone, whatever we might do if we were framing an entirely new scheme." (Riddell, "Constitution of Canada," pp. 102, 114.) As the Dominion of Canada was originally constituted under the Act of 1867, the legislature of Ontario consisted of one house, and those of Quebec, Nova Scotia, and New Brunswick of two houses. The last-named province reduced its legislative body to a single house in 1891. Manitoba was organized as a province in 1870 with two houses in the legislative assembly, but soon abolished the legislative council or second chamber. Prince Edward Island entered the federation with only one house, and this is also true of British Columbia, Alberta, and Saskatchewan. So that only two of the nine provinces (Quebec and Nova Scotia) have the bicameral system. Newfoundland is not in the federation.

Under the Commonwealth of Australia Act (Secs. 7, 16) the parliament of that federation consists of a Senate and a House of Representatives. The former body is composed of senators for each of the constituent states, chosen directly by the people of the state. Normally there are six senators for each state; but Parliament may by law increase or diminish the number of senators for each of the states, "but so that equal representation of the several

original states shall be maintained and that no original state shall have less than six senators." Senators are chosen for a term of six years, and the composition of the Senate changes by halves every three years. The qualifications of a senator are the same as those of a member of the House of Representatives. The system in force in New Zealand is more like that of Canada than that of Australia, since the members of the upper house, or legislative council, are appointed by the governor in council, not for life, however, but for a term of seven years. They are 45 in number. The 80 members of the House of Representatives are chosen by the electors. By the constitution of the Union of South Africa, (South Africa Act, 1909) the parliament consists of a Senate and a House of Representatives. The former body numbers 40 members, each of the four provinces being represented by eight senators, and the remaining eight senators being nominated by the governor-general in council. Four of the nominated members are selected mainly on the ground of their thorough acquaintance with the "reasonable wants and wishes" of the colored races in South Africa. The senators chosen in 1910 hold office for ten years; but after 1920 the Union parliament may make any alteration it sees fit in the constitution of the Senate. A senator must be a British subject of European descent, 30 years old, and a parliamentary voter in one of the provinces; he must have lived five years in the Union, and if an elected member, he must own real property in the Union of the clear value

of \$2,500. Members of the House are elected directly. Their qualifications are the same as those of a senator, except as to age and property. A parliamentary arrangement not unlike that of Canada, with an elective lower house and a legislative council appointed by the Crown (or the governor) is found in Bermuda, Barbadoes, and the Bahamas, though most of the other British colonies have only a single council, partly elective in Cyprus and Guiana, but elsewhere appointive.

Turning now to the continent of Europe, we observe that France, when settled constitutional government succeeded the chaotic conditions of the revolution, abandoned the concentration of legislative power in a single assembly and adopted the bicameral system. Under the constitution of 1875, one-fourth (75) of the members of the Senate were to be elected for life by the National Assembly (the two houses in joint session) and the remaining 225 for a term of nine years by electoral colleges in the several departments and colonies. But by an amendment in 1884, all of the senators are elected by the departments and colonies, without, however, disturbing the tenure of those who were then life senators, their places being filled only as vacancies occur. A senator must be a French citizen and at least 40 years of age. In Switzerland, the upper house or "council of states" is composed of members who are elected in the several cantons, but in each according to its own laws, and these laws are by no means uniform. They represent the cantons somewhat as the members of the

United States Senate represent the states, the national council, or lower house, representing the Swiss citizenry in general. In Belgium, the Senate is composed of members elected according to the population of each province, to the number of one-half the members of the House of Representatives, and of additional senators elected by the provincial councils, the latter varying from two to four according to the population of the province. Senators must be at least 40 years of age. Those elected by the provincial councils are exempt from any property qualification. But to be qualified as a senator of the other class, one must "pay into the treasury of the state at least 1,200 francs of direct taxes, or be either the proprietor or the usufructuary of real estate situated in Belgium, the assessed income of which amounts to at least 12,000 francs." A similar provision is seen in the constitution of the Netherlands. The 50 members of the upper house are elected by the provincial states for nine years, and one-third of the body changes every three years. The conditions to eligibility are to be a citizen of good repute and 30 years old, and "either to be one of the highest taxpayers to the national direct taxes, or to hold or to have held one or more of the important public offices designated by law." The number of "highest taxpayers" is limited to one for every 1,500 persons in each province.

The bicameral system prevails in two of the three Scandinavian countries, and in a modified form in the third. In Denmark, the Landsting, or

upper house, of 66 members, is partly appointed by the King and partly elected. The elected members are not chosen directly by the people, but by a body of secondary electors, elected by the people, by a complicated system of voting which is intended to secure a minority representation. In Sweden, in 1866, the ancient distinction of the four orders—nobility, clergy, bourgeoisie, and peasantry—disappeared, and the Riksdag was divided into two houses. The members of the upper house of this assembly are elected indirectly by electoral bodies, the qualifications being the attainment of the age of 35 years and the possession of a certain amount of real estate or a fixed income from capital or business. By the constitution of Norway it is declared that "the people exercise the legislative power through the Storting, which shall be composed of two bodies, the Lagthing and the Odelsting." The members of these two bodies are not, however, elected separately, but all are elected as representatives of the people in the Storting; and this assembly "shall select one-fourth part of its members to constitute the Lagthing, the remaining three-fourths shall form the Odelsting." All bills must originate in the more numerous branch of the legislature, and be transmitted to the other house, which may either approve or reject, in the latter case returning the bill with objections. If a bill so originating has been twice passed by the one house and twice rejected by the other, the entire Storting meets (in joint session, as we should call it) and it requires a two-

thirds majority to pass the bill. It thus appears that the smaller or second branch of the legislature, without the right of initiative, has the right to propose amendments, and has something like a suspensive veto, the exercise of which compels delay, reconsideration, and the final concurrence of an extraordinary majority. Norway is usually claimed as one of their successful examples by the advocates of the unicameral system, but the claim does not appear to be justified by the foregoing constitutional provisions.

If we consider the countries of the south of Europe, we shall still find the bicameral system in force. In Italy, the legislature consists of a Senate and an elected House of Deputies. The King can appoint for life any number of persons (at least 40 years old) to be members of the Senate (in addition to the royal princes, who sit there by right of the blood), but must make his selection from among twenty-one categories, the general result being that those are eligible who have had experience in filling high offices in the kingdom, whether legislative, judicial, or administrative, and also distinguished officers of the army and navy, members of the academy of science, rich men, and those who have distinguished themselves by public service or eminent talents. Both houses have the right of initiative and the concurrence of both is necessary to the enactment of a law. Any bill rejected by either of the houses shall not be introduced again at the same session. In Spain, also, the legislative assembly is divided into two houses, the Senate and the Congress of

Deputies, expressly declared by the constitution to be "equal in powers." The upper house is composed of three classes of senators: (1) senators in their own right, including the royal princes, certain high nobles, the heads of the army and navy, archbishops, and a few high officers of state; (2) life senators, appointed by the King from among twelve categories of eligible persons, much the same as in Italy; (3) 180 elected senators, chosen as follows: one by each of the nine archbishoprics, one by each of the six royal academies, one by each of the ten universities, five by certain associations, and the remainder by electoral colleges in the provinces. In Portugal, the republican constitution of 1911 provides that the Cortes shall consist of a Senate and a Chamber of Deputies. The senators, 71 in number, are elected by municipal councils for a term of six years, half being chosen every three years. The 164 deputies are elected by direct male suffrage for three years. Senators must be 35 years old, and deputies 25.

The constitution of the German Empire provides for a law-making body in two branches. But the upper house, the Bundesrath, does not in any sense represent the German people. Its members are ambassadors or councillors appointed and paid by the kingdoms, duchies, and other states sending them. They really represent the sovereigns or quasi-sovereigns who nominate them. There are 58 members, of whom the King of Prussia appoints 17, the King of Bavaria 6, the King of Saxony 4, and the others in smaller proportions.

Yet the Bundesrath has the initiative in legislation and frames all important measures of national concern. The Reichstag, or popular assembly, has a theoretical negative on such measures, its ratification being technically necessary, but it possesses little real power, and its influence is exerted chiefly as a medium for the expression of popular opinion, which is sometimes powerful enough to cause the fall of a ministry, but has not hitherto left its impress upon the constitution. It should be added that, in the legislature of Prussia, the King appoints the members of the upper house from among candidates presented to him by certain bodies or classes, the power of nomination residing chiefly with the nobility, families possessing large landed estates, the universities, and certain cities. The constitution of the Grand Duchy of Luxembourg provides for a single house of deputies, with the further rather curious requirement that each bill shall be voted on twice, at intervals of three months, thus in a measure supplying the lack of a second chamber. Austria, on the other hand, has the bicameral system, the upper house consisting of princes, nobles, and high ecclesiastics, and of others, from 150 to 170 in number, nominated for life by the Emperor from among those who have rendered notable service to the church or state or who are eminent in science or art.

As for the Slavic and Balkan countries, it should be noted that, in consequence of the reforms of 1905 and 1906 in Russia, a considerable measure of initiative and of legislative power

was vested in an assembly of two houses, the Council of the Empire and the Imperial Duma. The members of the former were partly nominated and partly elected, the members of the latter all elected. The consent of both houses was necessary to the enactment of any new law, and each had the right to propose the amendment or repeal of any existing law. But in that unhappy country, at the time this is written, there is no longer any trace of constitutional government, and what form of legislative body may eventually emerge from the present chaotic conditions it is impossible to predict. Rumania's legislative body consists of two houses, the Senate and the Chamber of Deputies. And the new constitution of Turkey (1908) makes provision for a bicameral parliament consisting of a Senate—whose members are appointed by the Sultan and hold office for life—and a House of Deputies. But in Serbia, Montenegro, Bulgaria, and Greece the legislative authority is concentrated in a single chamber. This appears also to be the case, in so far as any government exists, in the new Ukrainian Republic and in Finland, although before the present revolutionary conditions set in, the Diet of Finland was organized much like that of Norway, being composed of a single chamber of 200 delegates, of whom, however, 60 were selected to form a Grand Committee which was similar in its functions to the Norwegian Lagthing.

In Japan, by the constitution of 1889, the Imperial Diet consists of two houses, the House of Peers and the House of Representatives, the latter

being elected by the people. The House of Peers is composed of the members of the imperial family, of high nobles sitting in their own right, of certain nobles of lesser rank elected thereto by the members of their respective orders, of persons specially nominated by the Emperor on account of meritorious service to the state or of erudition, and persons elected, one for each city and prefecture, by and from among the taxpayers of the highest amount of direct national taxes on land, industry, or trade therein, and who have afterwards been appointed thereto by the Emperor. It is provided that "both houses shall vote upon projects of law submitted to them by the government, and may respectively initiate projects of law. A bill which has been rejected by either of the two houses shall not again be brought in during the same session."

Two streams of influence converged upon the making of the constitutions of the countries of Central and South America, the example of the United States, and their inheritance of Spanish laws and institutions. Both included the bicameral system in legislation. It was to be expected, therefore, that practically all of them would adopt that system, and we find this to be the case in thirteen of the twenty countries mentioned, but not in the other seven. A legislature of two houses is provided for in the five federations or federal unions, namely, the Argentine, Brazil, Colombia, Mexico, and Venezuela, and in eight other states, as follows: Bolivia, Chile, Cuba, Ecuador, Haiti, Paraguay, Peru, and

Uruguay. But the following states have a legislative assembly of one house only: Costa Rica, Dominican Republic, Guatemala, Honduras, Nicaragua, Panama, and Salvador. It is further noticeable that, in those countries of Latin-America having a legislature of two chambers, the composition of the senate or upper house is almost always based on the representation of states, or departments or provinces, as in the United States, and that its members are often, though not in all, chosen by an indirect system of election. Thus, in the Argentine, "the Senate shall consist of two senators from each province, elected by a plurality of votes of the respective legislatures, and two for the capital." In Brazil, "there shall be three senators for each state, and three for the federal district, all of them elected in the same way as the deputies." In Venezuela, "to form this chamber the legislative assembly of each state shall elect from outside its own membership two principal senators and two substitutes." In Mexico, "the Senate shall consist of two senators from each state and two from the federal district, chosen in direct election." In Cuba, "the Senate shall consist of four senators for each province, to be elected in each for a period of eight years by the provincial councillors and by double that number of electors, constituting, with the former, an electoral college. One-half of the electors shall consist of citizens paying the greatest amount of taxes, and the other half shall possess the qualifications required by law." In Uruguay, "the chamber of senators

shall consist of as many members as there are departments of the territory of the state, in the ratio of one senator for each department. The election of senators shall be indirect." In Chile, "the Senate shall be composed of members elected by direct vote from the provinces, each of which shall choose one senator for every three deputies." In Peru, each "department" elects a number of senators (from one to four) according to the number of "provinces" which it contains, and each littoral province is entitled to one senator. In Ecuador, "the Senate shall consist of two senators for each province." In Columbia, the Senate is composed of three senators for each department, and they are elected by the departmental councils. In Bolivia, the upper house is composed of two senators for each department. In Paraguay, senators "shall be elected at the rate of one senator for each 12,000 inhabitants or for a fraction of that unit not less than 8,000."

To sum up, then, we find a single and undivided legislature in seven of the provinces of Canada and in several of the British colonies (but not in the Dominion itself nor in any of the other great self-governing dominions of the British Empire), in Luxembourg, in four of the Balkan states, and in seven countries of Central America, with Norway and Finland in a doubtful or anomalous class. But the bicameral system prevails in all the other countries of the world which maintain a constitutional and representative government.

A survey of the composition of senates throughout the world seems to show a general endeavor on the part of the makers of constitutions to secure for such a body a higher order of ability, or greater importance, influence, wisdom, or dignity, than are generally attributed to the lower house. Devices adopted for this end are not capable of very clear classification, because two or more of them are combined in almost every system that can be found. But in a broad general way, they may be arranged in the following categories of qualification for membership in the upper house: (1) hereditary privilege; (2) eminence or distinction in the public service or in some important occupation; (3) the possession of a certain amount of property; (4) the attainment of a greater age than is required for the lower house; (5) representation of constituent states, rather than of the people at large, combined with one or other of the above qualifications. For even where the distinctive feature of an upper house is that its members represent states or provinces, and not the mass of the people directly, provision is made for securing a more influential or thoughtful body of men than in the lower house. And this is sought to be accomplished either by requiring, as a qualification in the candidate, a more mature age or the ownership of a fixed amount of property or income, or by a combination of these two requirements. In the United States also a senator must have been a citizen of the United States for a longer period than a representative.

There is no doubt that the framers of the Constitution also thought that the system of indirect election, by the state legislatures, would help in securing a better type of men for the Senate.

One of the chief arguments advanced against the further maintenance of the bicameral system in the state legislatures is that many of our cities have abandoned the plan of government by a council of two branches or houses, substituting the commission form of government, and have found that their affairs were better and more efficiently administered, and that therefore the same result would follow from a similar change in the state governments. But the nature of the work to be done by the governing body of a city is essentially different from that to be performed by a state legislature. The problems of a city are almost all of a business, financial, or administrative nature. Those which arise in the making or amending of the general laws for the governance of the entire population of the commonwealth are of a different order altogether. It is not proven that they should be dealt with by a body of legislators organized in the same way. It is not even proven that the commission form of government in cities is a success. It is still on trial; and it should not be overlooked that several cities which have tried it have abandoned it and returned to the plan of government by a mayor and council.

The other argument against the bicameral system proceeds upon the allegation that it is inefficient, dilatory,

and expensive. These objections have been summed up by a writer in *Municipal Research* (May, 1915, p. 63) as follows: The original justification and chief reason for two houses, assumed by this writer to be the representation of landed or other propertied interests in the senate, have disappeared with the establishment of identical suffrage for voters for both houses; the growth of strong party organizations capable of controlling, when in power, both houses of the legislature has rendered the idea of one house acting as a check upon the other practically obsolete; when the two houses are controlled by opposing parties wastefulness, friction, and political folly usually ensue; the maintenance of a legislature of two houses adds enormously to the cost of government; it divides responsibility; it gives opportunity for thwarting the public will through maneuvering for delays and deadlocks that could not obtain with one house. The same argument in different words is expressed by a writer in *Equity* (July, 1917, p. 120) as follows: "The two houses of the legislature represent identical people and interests. They are a sort of duplication of legislatures with the same origin and function, and they have made the law-making machine expensive and complex without either efficiency or responsiveness to the popular will. Men have come to see that if a state government is to become both efficient and representative, its policy-determining or legislative body must be organized on lines of good business, and that in its composition there should be a true reflex of the

various groups of opinion. What successful business corporation has ever indulged in the useless luxury of two duplicating boards of directors? In the aim thus to have one body keep the other from doing something wrong, both would be effectually barred from doing anything aggressively and efficiently right. That is practically the situation of the state legislature in America to this day."

The vice of this argument lies in the confusion between the processes of business and the processes of legislation. All our adulation nowadays is given to "efficiency." And no doubt state legislatures have sometimes to do with business affairs and should deal with them efficiently. But in the general field of legislation, justice and wisdom should rank above mere speed. And to this result undoubtedly the participation of a second chamber does contribute. It was well said by an experienced publicist, at that time the governor of a great state, that, as between the two houses of any legislative body in this country, "the tendency of the one is to impulsive action and of the other to conservatism, and out of this contest of opposing forces and this clash of conflicting thought, illuminated by debate and informed by investigation, come of necessity laws into the construction of which there enters not only the will of the people, but those elements of moderation, justice and wisdom, and that due regard for the rights of the minority, which are inseparable from wise and just legislation."

Neither is it correct to say that a second chamber is meant for the representation or protection of property, or of any other interest or class. That is not at all its function. It is to strengthen the other house, and to secure a greater measure of wisdom, appropriateness, aptitude, and stability in the ultimate results of the process of legislation. "Observation proves that when a measure is passed upon by two distinct bodies of men, deliberating separately, it will receive more criticism and consideration than if acted upon by the same number of men united in one body. It is a psychological fact that one's individual will is merged into the common will of an associate body in which he is called upon to act; and the larger the body the less voluntary his action. At least, the sense of personal responsibility is diminished in proportion to the number of those who are jointly responsible. And again, every separate deliberative body is more or less, consciously or unconsciously, in antagonism with co-ordinate bodies, and for this reason there is a sort of corporate impulse to an independent judgment. Hence there is an advantage in two legislative houses. Even if the people elected all their delegates at once, for the same terms, it would be better to separate them into two chambers than have them all act together." (Crane and Moses, "Politics," p. 177.)

We have not found a better summary of the arguments in favor of the bicameral system than that presented by Justice Story in his *Commentaries on the Constitution*, where he says:

"The value of a distribution of the legislative power between two branches, each possessing a negative upon the other may be summed up under the following heads: First, it operates directly as a security against hasty, rash, and dangerous legislation, and allows errors and mistakes to be corrected before they have produced any public mischiefs. It interposes delay between the introduction and final adoption of a measure, and thus furnishes time for reflection, and for the successive deliberations of different bodies, actuated by different motives and organized upon different principles. In the next place, it operates indirectly as a preventive to attempts to carry private, personal, or party objects, not connected with the common good. The very circumstance that there exists another body clothed with equal power, and jealous of its own rights, and independent of the influence of the leaders who favor a particular measure, by whom it must be scanned, and to whom it must be recommended upon its own merits, will have a silent tendency to discourage the efforts to carry it by surprise or by intrigue or by corrupt party combinations. It is far less easy to deceive or corrupt two bodies into a course subversive of the general good than it is one, especially if the elements of which they are composed are essentially different. In the next place, as legislation necessarily acts or may act upon the whole community and involves interests of vast difficulty and complexity, and requires nice adjustments and comprehensive enactments, it is of the greatest consequence

to secure an independent view of it by different minds acting under different and sometimes opposite opinions and feelings, so that it may be as perfect as human wisdom can devise. In the next place, there can be scarcely any other adequate security against encroachments upon the constitutional rights and liberties of the people. When a single legislature is determined to depart from the principles of the constitution, and its uncontrollable power may prompt the determination, there is no constitutional authority to check its progress. It may proceed by long and hasty strides in violating the constitution, till nothing but a revolution can check its career. Far different will be the case when the legislature consists of two branches. If one of them should depart or attempt to depart from the principles of the constitution, it will be drawn back by the other. The very apprehension of the event will prevent the departure or the attempt."

Experience often contradicts theory, and the conclusions of purely inductive logic do not always square with the facts. Whatever might have been anticipated, it is still the fact that, in most of our state legislatures and certainly in the national government, the senate is the more able and reliable body of men. To abolish the upper house would not be a piece of constructive statesmanship; it would be a retrograde movement, as it would lop off more than half of what is really valuable in the legislature. A more progressive course would be to increase the strength, dignity, and influence of

the second chamber. A recent writer has well remarked that "the long term, the fact that at least half of the members of the house are in most states sure to have had legislative experience, and the larger size of the districts they represent, tend to make the senate the stronger of the two bodies. The personnel of the senate is more experienced, more able, and of more political consequence than that of the house. As a smaller body it can transact business more efficiently. The share it has in the governor's power of appointment adds to its influence." (Reed, "Form and Functions of American Government," p. 123.)

And no one who watches the course of congressional legislation can be blind to the fact that the House of Representatives very often passes a very important measure in a form so crude and unscientific, or in words so confused and ambiguous, as to be unworkable. More than once members of the lower house of Congress have "voted for the bill with their eyes shut." It then becomes the function of the Senate to revise, amend, remodel, and reconstruct until the measure is fit for enactment into law. Senators have been known to remark, in the easy familiarity of the cloakroom, that the House positively relies on them to "lick into shape" the measures which it sends up. If anyone thinks this an exaggeration, let him recall to mind the shape in which the Income Tax law of 1913 left the House of Representatives, or the Bankruptcy Act of 1898, or, worst of all, the War Reve-

nue act of 1917. And here comes in another feature of American congressional practice which is of prime importance—the conference committee. In certain conspicuous instances, the doings of the conference committee have amounted to much more than a matter of mere bargaining between the two houses. It has exercised a very valuable office in the still more effective revision of an important measure, or even in the entire rewriting of important parts of it. But if it requires the occasional intervention of this third chamber (for in such cases it amounts practically to that) to mold an act which is of prime importance to the entire nation into even approximately perfect form and phraseology, it would appear that the proposal to reduce Congress to a unicameral body is a singularly foolish suggestion.

Of course a sufficient argument against doing away with the United States Senate is found in the fact that it was intended not merely as a second chamber of the legislative body, to aid and correct the lower house in the process of framing laws, but also as a body in which the states as such should find their representation. Even now that senators are elected directly by the people, this reason has not ceased to operate, and the importance it held in the minds of the makers of the Constitution is seen in the provision that "no state without its consent shall be deprived of its equal suffrage in the Senate"—the one irrepealable clause of the Constitution.

Constitutional Revision in the States

New Hampshire is now the only state in the Union in which amendments to the constitution may not be proposed by the legislature or by popular initiative or in any other way than by a convention called for the purpose of revising the constitution. Once in every seven years, a vote must be had for "taking the sense of the people as to a revision of the constitution and calling a convention for that purpose." The question having been submitted at the election in the fall of 1916, a substantial majority was cast in favor of calling a convention; and thereupon provision was made for the election of delegates in March, 1918, and for the assembling of the convention in the following June. As the time approached, it became evident that there was a very sharp division of opinion among the delegates as to whether any revision of the constitution should be attempted. Many prominent members thought that, notwithstanding their mandate was to "proceed to a revision of the constitution," the convention would show the greater wisdom in taking an immediate adjournment to some future time. The argument was that, in the midst of the distracted and abnormal conditions created by the war, it would require superhuman vision to frame a fundamental law suitable for times of peace, and for the conditions which will prevail after the end of the war—conditions which are sure to be greatly changed, but which no one can accu-

rately forecast. Besides, New Hampshire requires that an amendment to its constitution must receive the affirmative vote of two-thirds of those voting upon it, and it was felt that the absence of so large a part of the sons of New Hampshire in the army might prevent the vote from being truly representative of the will of the whole people. On the other hand, a large proportion of the delegates were disposed to insist upon the convention's proceeding with the task before it. Roughly speaking, the division was between the conservative and radical elements. The latter desired to bring before the convention proposals for the initiative and referendum, prohibition, unequal or disproportional taxation, and to make it easy to amend the constitution. Finding determined opposition to most of their plans, they proposed as a compromise that the convention should submit only one amendment to the people, that is, that in future the constitution might be amended by the legislature without the necessity of a convention. No particular attention seems to have been paid to this offer, and on the appointed day, June 5th, the 431 delegates assembled in the state house. On the following day a motion was made that the convention should adjourn until after the war. This was defeated, as was also a motion that the convention should limit its work to matters concerning the taxation of growing timber and of intangible property. A large number of proposed amendments to

the constitution were then introduced. But on the following day, a motion to submit all proposed amendments to special committees and to adjourn the convention to December 3d was rejected. An attempt was then made to pass, for submission to the people, an amendment giving the legislature "full power and authority to specially assess, rate, and tax growing wood and timber without regard to the rule of proportion otherwise required in taxation." The urging of this amendment was one of the principal reasons for calling the convention, so that its rejection by a vote of 159 to 122 was regarded as very significant. In fact, it became evident to the leaders on both sides that no business could be transacted, and that every amendment offered would be defeated. Therefore, despite the opposition of a strong minority, manifested in a long debate, the convention finally voted to adjourn at the end of that day's session, subject to a call of the president of the convention and of a committee of one from each county, to meet again "whenever the public good and necessity require, and in any event to meet within one year after the end of the war."

In Arkansas, a convention duly called for the purpose of revising the constitution of that state assembled in November of last year and effected an organization and provided for the appointment of a number of committees. To these committees were referred the various proposals for amendment which were offered in the convention, and thereupon that body took an adjournment until the committees should

have digested the material before them and prepared their reports.

The Massachusetts constitutional convention, which was in session last summer, prepared, accepted, and submitted to the voters at the November election three amendments to the constitution of that state, all of which were adopted at the polls. (See the *REVIEW* for January, 1918, page 36.) It also adopted and submitted an amendment providing for the popular initiative and referendum, which will be voted on next month. Thereupon it adjourned to a date ten days after the prorogation of the legislature then in session. As the time for its reassembling drew near, there was manifested a disposition to postpone all further deliberations until after the war. But a "conference" of some thirty of the delegates, composed of members of the committee on rules and the chairmen of various other committees, voted to resume and finish the work of the convention, in which decision there seems to have been a general acquiescence. On the 12th of June, therefore, the convention reconvened, numbering now 306 active delegates, two having died since the adjournment and ten having left their places to engage in war work. The convention found its work much better organized than at the first session, as 170 committee reports were placed before it, embracing 230 original proposals left over from the previous session. It was predicted that the great majority of these would be dealt with summarily, in so far as that adverse reports from the committees would be adopted without much de-

bate. And indeed the convention has since shown itself to be on the whole conservative and very little disposed to meddle with the fundamental principles of the state government. Its criticism has been mostly destructive.

In the first place, and to the surprise of many people, the convention absolutely refused its approval to the carefully prepared plan for strengthening the executive branch of the government. This plan embraced the following proposals: That the terms of office of the governor and lieutenant governor should be two years instead of one as at present; that all executive and administrative officers should be placed under the direct control of the governor and subject to removal by him alone, after a hearing; that the governor should have authority to initiate and recommend bills to the legislature, which should be known as "executive bills," and which could not be stifled in committees, but must be acted on within thirty days; that the governor should have power to refer to the voters for final decision any executive bill which the legislature refused to pass, and also any bill passed by the legislature over his veto; that the governor and the heads of the state departments should have the right to appear before either branch of the legislature, and to speak, though not to vote; that the legislature might require the governor and the heads of departments to appear before either branch to furnish information; that the governor might return any bill passed by the legislature with specific suggestions for

its amendment; and that he might veto particular items of such legislative measures as should fail to be amended in a manner satisfactory to him. The last item on this program was indeed accepted and ordered submitted to the people. And a proposition for biennial elections, not only of the governor, but of other elective state officers and of the members of the legislature received a favorable vote. But all the other planks in the platform relative to the executive were rejected, by decisive majorities, notwithstanding that the entire list was recommended to the convention by the unanimous vote of its committee.

As for the legislative branch of the government, the convention expressed itself as satisfied to continue in use the somewhat archaic title "General Court" as the designation of the law-making organ of the commonwealth, and rejected a proposal to substitute the name "The Legislature." It also refused, and by an almost unanimous vote, to abolish the state senate and reduce the legislature to a body of one chamber. It also had to consider a resolution for an amendment which would empower the lower house of the legislature, by a two-thirds vote, to override the action of the senate in defeating any measure passed by the house. Though the advocates of this proposal—plainly looking in the direction of a unicameral legislature—had much to say of the alleged evil influence of corporations over senators, and of "the necessity of having some way in which the popular will might overcome the power of the

corporations," and pictured the situation as "deplorable and demanding relief," yet the convention rejected the resolution by a large majority. This was likewise the fate of a proposal to have the apportionment of the legislature based on the total population of the state, instead of on the number of legal voters as at present. The change was apparently asked in order to secure a larger proportional representation for those industrial centers in which there is a large population of unnaturalized aliens. To conclude with this branch of the subject, the convention rejected an amendment for biennial sessions of the legislature; so that, if the amendment for biennial elections should be adopted, the legislature would be elected every two years but would meet annually.

There was much anxiety lest the convention might be influenced by radical agitators to break down the time-honored and well-tested judicial system of the state, in fact, to "democratize" the judiciary by making them subject to popular election at short intervals. These projects were very strongly urged and received a not inconsiderable support. But finally the convention resolved to leave that branch of the state government substantially where it is at present, that is, with the judges appointed and holding their office during good behavior, as in the federal system. A proposed amendment for the election of the judges by the people was defeated by a vote of 125 to 32. Several proposals were made for limiting the term of office of the judges,

the period suggested ranging from seven to ten years. One of these, being brought to a test, was rejected by a vote of 104 to 38, and the opposition to the existing status of the judiciary system was thereupon supposed to be foreclosed, although the convention afterwards accepted a proposed amendment giving the governor power to retire from office any judge who should become disqualified by advanced age or mental or physical infirmity, a provision not at all inconsistent with that clause now found in the constitution of Massachusetts for the removal of judges by the governor on the address of both houses of the legislature, but rather supplementary to it. It is believed that there was general satisfaction throughout the commonwealth upon the failure of the assault upon the courts. The best sentiments of the majority of the people were voiced by the *Springfield Republican* in saying: "The answer to all the criticisms is that Massachusetts has good courts, that no state judiciary in the Union stands higher in the confidence and esteem of the people, and that Massachusetts decisions are still quoted with respect the world over." In this connection, and as marking a further and more insidious attack upon the courts, one of the amendments proposed to the convention embodied the sinister suggestion that the legislature should be empowered to determine the limits of the police power, *without recourse to the courts*. This was rejected after a long debate, but by an almost unanimous vote.

One of the amendments favored by the convention was for the adoption of the budget system in estimating and appropriating for the expenses of the state, and it included the provision now found in the constitutions of three-fourths of the states which permits the governor to veto separate items in appropriation bills. Another amendment, which was adopted by a vote of 127 to 74, reads as follows: "The conservation, development, and use of agricultural, mineral, forest and water resources of the commonwealth are public uses, for which the legislature may take or authorize to be taken, by purchase or otherwise, lands or easements or interests therein, including water and mineral rights, and may enact legislation necessary or expedient for securing and promoting the proper conservation, use, and control thereof." But the advocates of the single tax on land values had cold comfort, their proposals being decisively rejected, and the convention also refused to dislodge from the constitution the ancient requirement that taxation shall be "proportional." Both the amendment for the prohibition of the manufacture and sale of intoxicants and that for woman suffrage were rejected without debate, as the leaders of the various factions both for and against these propositions were satisfied that both subjects would soon be taken out of the control of the states by the adoption of the pending amendments to the Federal Constitution.

In dealing with the ever recurring problem of labor, the convention showed a wise and conservative tem-

per, notwithstanding that the debates at times were fiery. It rejected a proposal for the compulsory arbitration of labor disputes, and also one which would restrict the present power of the courts in dealing with such matters by the writ of injunction, and one which was intended "for a clearer declaration of certain rights of working men and women, and asserting that labor is a personal right and not a commodity or article of commerce." But by a vote of 100 to 38, it accepted an amendment authorizing the legislature to pass laws regulating and restricting the hours of labor and establishing a minimum wage. It was voted to submit to the people an amendment which would make it possible for cities and towns, with the consent of the legislature, to build dwellings and sell them at cost to their citizens, and another which would empower the legislature to regulate "advertising on public ways, in public places, and on private property within public view," so as to do away with the billboard nuisance. But plans for a system of state insurance of working people against loss of income through old age, accident, sickness, unemployment, or other causes were defeated by a vote of 107 to 43.

One of the most interesting proposals was an amendment to empower the legislature to provide for compulsory voting, that is, to require all qualified voters, under penalties, to attend and cast their ballots at all elections. After protracted debate, this proposition was rejected by a very narrow margin, but at a later day was adopted by the substantial majority of 148 to 96. Sev-

eral other amendments were passed by the convention and ordered submitted to the people, but they are all of minor importance. Among them are provisions for the preservation and maintenance of property of historical and antiquarian interest; to permit the legislature to take a recess of not more than thirty days during the first two months of its annual session; for the selection of the officers of the state's military and naval forces by appointment rather than by election; to make women eligible to appointment as notaries public, and to subject all public grants, franchises, privileges, and immunities forever to revocation or alteration. In all, nineteen proposed amendments to the constitution will be on the November ballot for acceptance or rejection by the people.

The convention provided for the appointment of a committee of eighteen members to meet at some time after the elections, probably next year, for the purpose of codifying and arranging the amended constitution in such manner as to place all the parts in duly related order, but of course without the power to make any substantial changes. The convention adjourned August 22d, having been in actual session on 117 days, and having cost the state, it is estimated, something more than half a million dollars.

At the general elections next month the people of three states, Illinois, North Carolina, and Washington, will vote on the question of calling conventions for the revision of their constitutions. And in several other states, al-

though the movement for a new constitution has not advanced to this stage, it is the subject of constant and persistent agitation. This is true, for example, of Texas, Virginia, and North Dakota, and in a less degree of Pennsylvania and New York. In Rhode Island, according to the decisions of the courts of that state, it is not possible to hold a convention for revising the constitution. The only method of effecting an amendment is by a resolution of the legislature, concurred in by two succeeding legislatures and then submitted to the popular vote. And so insistent is the demand for a new constitution, and so reactionary the position of the legislature towards making any change, that it is said that leading lawyers of the state are preparing a case for the consideration of the Supreme Court of the United States, in the hope that the rulings of the state courts may be reversed and the way opened for the calling of a convention. The ground of their application, it is stated, will be that Rhode Island does not enjoy "a republican form of government" so long as the people, the direct source of power, are not permitted to initiate changes in their organic law.

In Illinois, the chief objection to the present constitution seems to be that it is exceedingly difficult to amend it. The *Chicago Herald* observes that "there is never a proposal for a far-reaching and fundamental reform in Illinois that doesn't come in contact with the barrier of our unchanged and, under present amendment provisions, practically unchangeable, constitution."

And the *Chicago Tribune* thinks that "the wise thing for the people of Illinois to do is to vote in November for the calling of a constitutional convention and then proceed with it and with the making of a new constitution without further hesitation and faltering. The chances are that even this war will be over before a new constitution is ready for submission to the people, and if it is not, arrangements can be made to protect any essential equities which the soldier vote has."

But elsewhere there seems to be a general opinion that the present is an exceedingly inopportune time for making or revising constitutions. The *Spokane Spokesman-Review* observes: "Before the United States went to war, a belief was growing that the state of Washington had outgrown the constitution it adopted in 1889, and that the time had come for the election of delegates to frame a new constitution more in harmony with the times. If the world had remained at peace, it is probable that definite steps would have been taken along that line this year, but by tacit understanding it is now generally realized that a constructive task of that moment and magnitude should be put over to the return of peace; that it would not be wise to complicate the problems of war and divert the public mind by forcing thought into new and difficult channels at this time. The framing and adoption of a new constitution is a big undertaking in itself, and should not be attempted until the public can give it undivided thought. It is a task that easily could be boggled, and

if attempted now, the public would almost surely awaken later to a realization that it had adopted, without sufficient consideration, a new constitution that was no improvement over the old." Other reasons for deferring the reconstruction of constitutions are seen by the *Dallas (Texas) News* in the fact that "all social and political problems must be radically affected by the conditions which peace will impose upon us. We shall be compelled to undertake important works of reconstruction, but it is only under the direction of realities that we can undertake these works with any confidence of fitting our fundamental law to the practical requirements. All things are in such a state of flux now that every consideration of what changes should be made in the constitution must be academic, or at least largely so, whereas it will become practical when we know what structural changes the war has made compulsory." But beyond this, there is grave danger in the mistaken notion that measures and expedients resorted to under the abnormal exigencies of a state of war may suitably be incorporated in the fundamental and enduring law of the state or nation. It is well said by the *Norfolk Virginian Pilot*: "The present is a juncture when the pressure of war's exigencies on the popular mind operates to engender disregard of fundamental principles of government, and to create a disposition to meet temporary emergencies by novel expedients. The danger is imminent of sacrificing the essentials of democracy to the preservation

of its forms. Such a period is manifestly inauspicious for the calling together of a body to remodel the constitution of the state. The alterations to be expected would reflect abnormal conditions and empiricism would supplant the fruit of long experience. It is true in Virginia, as in the nation at large, that there is far more need of

conserving the institutions we have against the persistent spirit of innovation than there is of shifting landmarks and boundaries in answer to currents of sentiment, neither determinate nor determinable, resultant from cross-winds and fluctuating tides. An era of storm is not that to be chosen to fix the bases of a state."

Sedition, Its Definition and Punishment

After the lapse of a hundred and twenty years there is again upon the statute book of the United States a law for the punishment of that insidious and scurrilous form of disloyalty which falls just short of treason. The dust of a century had gathered upon the pages of the first sedition act, and the circumstances which called it forth, the tremendous animosities which it engendered, its effect in bringing about the downfall of a great political party, and even the fact that it was the parent of sinister suggestions from two of the states endangering the very stability of the Union, had almost passed into oblivion. Who would have supposed that the present year would witness the enactment of a still more comprehensive and stringent law? In 1798, at least half the people of the United States denounced the alien and sedition laws of that day as violations of the Constitution and as abhorrent acts of tyranny. The act of 1918 is not only quietly accepted, but is approved and applauded, by all respectable citizens, by all, indeed, save the few wretches who may be destined to feel

its rigors. Stranger still, in the vicissitudes of time and chance, that country whose ardent friends were swept into currents of treasonable denouncement of their own government by the excess of their zeal in her behalf, is now among the most honored and perhaps the best beloved of our allies. When John Adams was our President, France was still reeling from the shock of the revolution. The Directory had most unjustifiably attempted to interfere in the administration and policy of the United States, had put unendurable affronts upon our diplomatic agents, and had authorized or connived at repeated depredations upon American commerce. It was felt that war was imminent. In fact, a restricted and unacknowledged war was actually in progress. Preparations were made for hostilities on a larger scale; intercourse with France was suspended; the treaties with that country were declared annulled. But this was the program of the Federal party, then in power but not supported by an undivided public sentiment. In fact a traveler in America at that day re-

marked that there seemed to be many English, many French, but very few Americans. Yet in the crisis of a war it would be impossible to maintain the dignity and power of the country, or even to secure the national safety, if the government was to be constantly subject to a back-fire on the part of sympathizers with the public enemy. For this reason the sedition act of July 14, 1798, was passed.

It provided, among other things: "If any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing, any false, scandalous and malicious writing or writings against the government of the United States or either house of the Congress of the United States or the President of the United States, with intent to defame the said government or either house of the said Congress or the said President, or to bring them or either of them into contempt or disrepute, or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage, or abet any hostile design of any foreign nation against the United

States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding \$2,000, and by imprisonment not exceeding two years. This act shall continue and be in force until the third day of March, 1801, and no longer."

This statute was the death-warrant of the Federal party. For the Republicans believed that it was a partisan measure and that it was directed against them as a party. They were unsparing in their denunciations of it, in and out of Congress. They declared that it was a palpable violation of the First Amendment to the Constitution, in that it abridged the freedom of speech and placed a padlock on the press. Prosecutions under the act were pressed in the courts, and aroused intense public resentment. Unable to secure the repeal of the obnoxious statute, the leaders of the opposition had recourse to the state legislatures and endeavored to use them as a means for continuing the contest. In two cases they were successful in this. The legislature of Virginia adopted a set of resolutions, drawn up by Madison, which declared that it lay with the states to interpose against any unlawful assumption of power by the general government; that the Congress, in enacting the alien and sedition laws, had overpassed the boundaries of legitimate federal power; and that the State of Virginia solemnly declared those laws to be unconstitutional, and invited the other states to join in the declaration.

The Kentucky resolutions (of which Jefferson was the author) went even further, since they avowed the doctrine that "nullification" was the rightful remedy for keeping the general government within its limited sphere. But the movement went no further at that time. These resolutions were disapproved, and counter resolutions were adopted, in answers returned to Virginia and Kentucky authorities by the legislatures of Massachusetts, Delaware, Rhode Island, New York, Connecticut, New Hampshire, and Vermont. The sedition act expired by its own limitation in 1801, and thereafter, although bitter and disloyal criticism of the government and its officers, of American institutions, and even of the fundamental principles of the American Constitution, has at times been rife, it has not been thought necessary to denounce the expression of such sentiments as a crime, until the exigencies of this greatest of all wars required stern measures for the repression of the traitors within our gates.

By an act approved May 16, 1918, and intended to amend and strengthen the espionage act, it is provided, *inter alia*: "Whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, or any language intended to bring the form of govern-

ment of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies . . . and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both."

There was considerable opposition to this bill in Congress, but very little of it was based on the provision we have just quoted. For the most part it was directed against the final section of the act, which gives authority to the Postmaster General, "upon evidence satisfactory to him that any person or concern is using the mails in violation of any of the provisions of this act," to refuse delivery of all mail matter to such guilty persons. On the final passage of the bill in the House of Representatives, however, it is the fact that only one vote was cast in the negative. That vote was cast by the one Socialist member of the House. He had taken occasion in debate to express disapproval of that clause in the statute

which protects the Constitution of the United States against "disloyal, profane, scurrilous, or abusive language" or against language intended to bring it into "contempt, scorn, contumely, or disrepute." He met a fitting rebuke at the hands of another Representative, who exclaimed: "I am eternally opposed to having the Constitution made over along the lines of a Karl Marx book on socialism, and I am also opposed to making the Stars and Stripes into a red flag of revolution for the anarchist or the I. W. W. or the socialists."

A textual comparison of the earlier and later sedition acts would disclose some interesting points of resemblance and some of difference. It will be noticed, for instance, that while the act of 1798 was limited in its duration to three years, that of 1918 is intended to be a permanent part of our statutory legislation, but it is in force only "when the United States is at war." It is also worthy of remark that the penalties prescribed by the new law are very much more severe than those imposed by the old, the maximum fine being \$10,000 instead of \$2,000, and the longest possible term of imprisonment being twenty years instead of two. But no respectable citizen need go in fear of this law. It is plainly not intended to prevent or punish any honest and temperate criticism of the government, or of any of its officers, or of any measures it sees fit to enact. Within the limits of sobriety and decency freedom of speech and of the press is in no way infringed. But it should put a stop—at least for the duration of the

war—to much of that flood of scurrilous and abusive disparagement of our form of government and our Constitution which, of late years, has threatened to undermine the very foundations of our institutions. To defame the Constitution is now a crime; and not only anarchists who clamor for its overthrow, but airy young gentlemen who pronounce it "fit only for the ash heap" are in danger of incarceration.

While this bill was pending in Congress, Senator Chamberlain introduced a bill which would have taken the trial and punishment of sedition cases from the civil courts and placed them within the jurisdiction of military tribunals. For this purpose, persons offending against the espionage act, the sabotage act, the draft act, or other war measures were to be defined and treated as "spies," and the Senator's advocacy of his bill was based on the plea that the execution of justice upon such persons should be both summary and speedy. But before the matter came to a vote, the President sent a letter to the chairman of the committee having the bill in charge, in which he said: "I am wholly and unalterably opposed to such legislation. I think it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and affecting to despise. It would be altogether inconsistent with the spirit and practice of America, and I think it is unnecessary and uncalled for." Thereupon Senator Chamberlain announced that he would withdraw the measure, since it was evident that, if passed, the President would veto it. It may be recalled that

Great Britain took a similar step at the beginning of the war, but was obliged to retract it. The first Defense of the Realm act, in August, 1914, subjected to trial by court martial all persons guilty of violating the regulations or orders in council to be issued under the act with regard in general to acts which might assist the enemy. This, it was stated, placed not only alien enemies but all the English people under the rule of military law. But so strong was the opposition to this feature of the act that it was amended in the following March so as to give to British subjects the right to claim a trial by jury.

There seems little reason to doubt that the President was absolutely correct in his opposition to the Chamberlain bill on constitutional grounds. It should never be forgotten that the Constitution of the United States is not for a moment abrogated or even suspended by the existence of a state of war. Its grants of power and authority are ample to meet even such an exigency. It embodies the very principles for which we are waging this contest. Is it a war to make the world safe for democracy? The Constitution creates the most perfect form of democracy yet devised. Is it concerned with the self-determination of peoples? The preamble of the Constitution declares: "We, the people of the United States, do ordain and establish this Constitution." Is the war in vindication of international good faith and the sanctity of treaties? The Constitution ordains that "all treaties made, or which shall be made, under the author-

ity of the United States, shall be the supreme law of the land."

Now the Fifth and Sixth Amendments secure the right of trial by jury in all criminal prosecutions with only one exception, namely, "in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." Courts martial have jurisdiction over persons in the military service or otherwise subject to military law. But they are not a part of the judicial establishment, and their authority is not a part of the "judicial power of the United States" defined in the Third Article. They are, as an eminent authority on military law has remarked, "simply instrumentalities of the executive power, provided by Congress for the President as commander in chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives." But trial by jury is a common-law right of great antiquity, and was expressly recognized and secured by Magna Charta. All that our constitutions do is to reaffirm it and place its continuance beyond the hazard of ephemeral changes of public opinion or the pressure of imaginary necessity in abnormal times. But this and the other guaranties of the Constitution are for the people of the United States and for such friendly aliens as may be within our borders. Alien enemies have no rights and no privileges, unless by special favor, during time of war; the constitutional safeguards are not for them. If they are arrested, in-

turned, ordered out of prohibited zones or vicinities, moved from place to place, or deported, they cannot assert that they are deprived of their liberty

without due process of law. Neither could they set up any justifiable claim to the right of being tried by a jury, if proceeded against as spies or plotters.

A Liberty Loan in Ancient Rome

As the campaign for the fourth Liberty Loan will be in progress when this number of the REVIEW reaches our readers, it will be of interest to recall an episode in the history of the Roman Republic which, in many particulars, furnished a most striking analogue to events and conditions engendered by the present great war. For Rome, too, faced a redoubtable and ruthless foe. Rome, too, was a republic, and the destruction of Carthage was essential to the safety of the world. And Rome, too, resorted to a Liberty Loan as a means of financing a tremendous war, and its amazing success so filled the hearts of the people with confidence and patriotism that the heightened morale of the Romans was of infinitely greater value to the state than even the immense sums it brought to the treasury.

It was in the darkest period of the second Punic war. A picture of the state of the Roman people and their armies is drawn for us by Liddell, from whose "History of Rome" (chapter 33) the following quotations are taken. "The unmolested march of Hannibal to the walls of Rome showed that no part of Italy save the fortified towns and entrenched camps could be called their own, so long as the Carthaginian general could lead his wild and lawless mercenaries whithersoever

he pleased. The loss of Spain had placed before them the dreadful possibility that their great enemy might soon be reinforced by numbers so large as to make him stronger than he had been since he crossed the Alps." But there was impatience with the Fabian policy of delay in the conduct of the war. Must the Romans stand forever on the defensive? Like the Americans twenty-one centuries later, they were eager to take the offensive, push back the barbarians, and put an end to the whole sanguinary business. But the times were hard and the government struggled with financial difficulties which seemed insuperable. Just as in our day, the price of wheat had risen from its normal level of about fifty cents to two dollars the bushel. Just as with us also, the government had doubled all the taxes early in the war. But here for a moment the parallel lines diverge. Though we have unfortunately witnessed some profiteering and some scandals in connection with supplying the government's needs, no such shameful picture has been placed before our eyes as that disclosed by the following passage: "The Senate proposed to the contractors to supply the required stores, and wait for payment until the end of the war, it being understood that whatever was shipped from Italy was to be paid for, whether

the vessel reached its destination or not. This offer was readily accepted, but some of the contractors were guilty of a fraud, disgraceful enough at any time, but at a time when the state was struggling for very existence, utterly detestable. These wretched men put a quantity of worthless stores on board crazy vessels, which were purposely lost on their passage, and then claimed payment in full according to their contract. The fraud, however, was discovered, and these unworthy citizens were obliged to seek refuge in dishonorable exile." Neither will our government be obliged to resort to the expedient which the Romans took, of commandeering the estates of all widows and orphans which were in the hands of trustees and guardians, giving treasury bills in exchange.

To fill the depleted forces of the navy it was necessary to have recourse, not to a conscription of men, but to a conscription of wealth. "An extraordinary measure was taken for manning the fleets. All citizens except the poor were required to furnish one or more seamen, with six months' pay and their full accoutrements. Senators were called upon to equip eight, and the rest in proportion to their rated property. Such was the Roman ship-money." The story of the diminishing purchasing power of money and of the rising cost of living reads like a bit of contemporary history. A certain temporary relief was gained by diminishing the metallic contents of the standard coins, but "the prices of all articles were raised to meet the change, and public credit was shaken."

Such was the crisis in which the republican chief of the state conceived the idea of a Liberty Loan. "In these difficulties," says Liddell, "the Senate again proposed to levy ship-money. But the people were in no mood to bear it. They had been much impoverished in the last four years; continued increase of taxation had drained their resources; continued service in the army had prevented the proper cultivation of their lands; the marauding march of Hannibal in the year before had ruined many. The ferment caused by this new impost assumed a very formidable appearance. The Senate met to deliberate, and the Consul Laevinus proposed that the great council should set an example of patriotic devotion. 'Let us,' said he, 'contribute all our treasure to the service of the state. Let us reserve, of gold, only our rings, the bullae worn by our sons, and for the ornaments of our wives and daughters one ounce apiece; of silver, the trappings of our horses, the family salt-cellar, and a small vessel for the service of the gods; of copper, five thousand pounds for the necessities of each family.' This proposal was carried by acclamation, and the noble example followed emulously by all the people. So eager was the throng which pressed to the treasury that *the clerks were unable to make a full register of the names*. This patriotic loan (for it was intended that it should be repaid hereafter) saved the state; *and it was even more valuable in the spirit which it called forth than for the actual relief which it afforded to the treasury.*"

Important Articles in Current Magazines

"What the War Has Done to Socialism in America."

Mr. Allan L. Benson, long a leader of the Socialist party, and its candidate for the presidency in 1916, but who recently severed his connection with it on account of the party's unpatriotic attitude towards America's participation in the war, contributes an article under the above heading to *Current Opinion* for August, 1918. The socialism to which he now adheres will have nothing to do with anarchy. It repudiates syndicalism. So far from thinking government a necessary evil, it would vastly extend its scope. It is more a philosophy than a program. And even so, it is not very far in advance of the most advanced progressivism of 1912. "The socialist idea is that it is more advantageous for the people, acting through the government, to do certain things for themselves that they cannot do individually, than to entrust private individuals with the performance of these services." Taking this as the definition, it is Mr. Benson's belief that "so far as socialism in America is concerned, the war has worked a paradox, in that both the people and the government have welcomed part of the philosophy, but have kicked out the party. War has disclosed that certain socialist principles work, but that the party doesn't. One is fit and the other isn't. It is fortunate for socialism that it is not the other way about. Principles can exist without a

party, but a party that has no other purpose than to bring its principles to the favorable attention of the people of the United States, yet, by reason of its leadership, is unable to do so, has no justification for existence." The tremendous necessity of making war effectively and of co-ordinating all the resources of the country for that purpose, has compelled the government to assume a practically unlimited control of transportation, express business, food, fuel, industry, the prices of commodities, and many other things which intimately touch the daily life of the citizen. "Each of these innovations necessary to win the war," says Mr. Benson, "is socialistic. The significance of the last syllable will be perceived. They partake of the nature of socialist measures without actually being socialism. They are like the approaches to a bridge. Some socialists have yet to learn that it is well to have approaches, wherefore they belittle the rising grade and clamor to be off at once across the main structure. Another class of gentlemen believes the approaches have no significance—that they lead to nothing, and soon after the war, will be smoothed down to the ancient level of the meadow." With the latter, at all events, Mr. Benson can by no means agree. He believes that much of what was erected only out of the necessity of war will be retained after the return of peace, because an eminently practical people will have discovered that it is both workable and beneficial. Per-

sonifying the food administration as a part of what the socialists would like to retain, he says: "Mr. Hoover, in his official capacity, stands for an exceedingly revolutionary idea. He repeals the law of supply and demand. He is a living denial of the right of the individual to do what he wills with his own. He is a flaming affirmation of the right of society to lay hands upon the goods of the individual and insist that private ownership shall not be used against society's interests."

How all this is to be accomplished within the limitations of an inconveniently inflexible Constitution Mr. Benson is not clear. But he turns hopefully to what he calls the "general welfare" clause of the Constitution, "under which anything can be done, and under which many things have been done. If all else shall fail, we still have the right to amend the Constitution, and if necessary shall do it." But the process of abolishing private ownership should not be too much hurried. The slightly abrupt methods of Trotsky and Lenine are hardly well advised. War "is teaching us now to lessen the control of the few over the things we all must have to live. We shall persistently apply this process. First the owners will become accustomed to less control and then to no control—to reduced profits and then to infinitesimal profits. It is but a short step from loss of control to loss of ownership through purchase by the government, and with profits whittled away the only incentive for private

ownership will disappear." This brings Mr. Benson, as he says "to democracy." But it is not quite the type of democracy which socialists have usually demanded, namely, that which would reduce the entire population to an equal level of dull and contemptible mediocrity. For he wishes his democracy to be presided over by an autocrat-guardian, subject to be checked by a refusal of acquiescence on the part of his possibly rebellious wards. He would like to see the President vested with power to take any and every governmental step which may occur to him as desirable, but with the proviso that he must first give six months' notice of what he intends to do, whereupon the people may "pull a referendum" on him, and flock to the polls for the purpose of giving or withholding their permission. This may be democracy. Almost anything can masquerade under that name. But at best it would be a denatured democracy. There still linger a few people who believe that justice and liberty are among the essential elements of democracy. But with Mr. Benson's "flaming affirmation" of the right of society to lay hands on the goods of the individual, his cumulative process for easing the citizen of his right to run his business, or even to engage in it, and the benevolent activity of his supreme executive (subject to the approval of the soviets), justice and liberty would have about as much chance of surviving as snow flakes upon the sunny bosom of the Sahara.

“What Do We Mean By Democracy?”

Professor Ralph Barton Perry, of Harvard, propounds this question in the July number of the *International Journal of Ethics*, and follows his definition with the very searching question whether we really mean to make our ideals of democracy come to realization, at home more especially, and whether we have the courage to see it through. For we are fighting in this war “in order that we may exist in a certain specific way, or in order that a certain specific form of life may through us retain a place in the world. We usually call this specific form of life by the name of ‘democracy.’ If we are to be taken at our word, then, we not only intend to exist, and to exist with undiminished strength, but we intend also to be democratic, and to be more fully and more consistently democratic than we have as yet grown to be.” The three great ideas associated with the democratic tradition are equality, liberty, and popular government. Assuming that the second and third are not ambiguous terms, Professor Perry’s paper confines itself to a discussion of the idea of equality, as defining democracy as a state of society rather than as a form of government; and he conceives equality not as a premise, but as an ideal of social reconstruction. The idea of equality as a desirable thing, as a thing to be striven for, and equally as a thing to be put into practice, appeals, he thinks, to five different human motives. First, there is compassion. Pity for the unfortu-

nate, the repressed, and the backward is an equalizing motive, because, being essentially remedial rather than constructive, “it applies itself to raising the minimum rather than the maximum. It halts the vanguard of civilization in order that those who are dropping by the way or lagging in the rear may be brought abreast of the marching column. It is less interested in the perfection of the few, who demonstrate the heights to which human nature can attain under the most favorable conditions; it is more interested in providing the unfortunate man with the staple goods of health, food, and protection.” So far, then, he says, the idea of equality means a community and mutuality of life, in which all men shall achieve happiness and perfection together, at a pace which requires neither the abandonment nor the exploitation of the unfortunate. Next comes the motive of emulation. Its functioning is not so clear. But the author points out that while this feeling makes a man strive to surpass the achievements of others, it also makes him resent the awarding of any unearned prize to another. It demands fair play and a square deal. It is of the essence of sportsmanship that all the competitors should be given an even start. That is, democracy means equality of opportunity. Success must be determined by talent and energy, not by accidents of birth, connection, or influence. But “we must not deceive ourselves by giving the name of opportunity to mere neglect. More often than not, equal opportunity has to be created by actively intervening against

established injustice. And we must remember that for all alike to have some chance of the highest success does not at all imply that they have a like chance even of the smallest success. There is all the practical difference in the world between a fair chance and an off-chance." Third, the motive of self-respect or the resentment of arrogance is an equalizing tendency, not that it implies any dislike of real superiority, but that it hates the affectation of superiority, and will hunt it out and rebuke and destroy it. Hence "a democracy of opportunity must be at the same time a democracy of personal esteem." "Either the masses of men must be broken in spirit and convinced by subjection of the utter helplessness of their lot, or, if they are once allowed to travel on the highroad to success, their pride must be respected. A man cannot be given opportunity without the acknowledgement of his dignity." A further motive to equality, and one which is the converse of that just considered, is the sentiment of fraternity. Self-respect demands the esteem of others and resents disparagement; fraternity acknowledges the just pride of others and accords them that which self-respect demands. "It is the essential spirit of that finer companionship which even kings have coveted; but in a diffused and rarified form it is the atmosphere which is vital to a democratic community." Fraternity encourages freedom of manners, but not necessarily the belittling of others. On the contrary, democracies are only too much given to hero worship. But it is

the achievement that is admired and applauded; the man remains a brother. "Only those will be happy in a democracy who prefer to be greeted neither by the upward slant of obsequiousness nor by the downward slant of condescension, but by the horizontal glance of fraternal self-respect." But undoubtedly there is a fifth motive operating back of the idea of equality; and it is a mean and base one. It is the motive of envy. It is negative, destructive, and malicious. "Whereas emulation seeks equality by clearing the course and speeding up the race, envy seeks equality by slackening the pace and impeding the leaders." There is too much of this envious democracy abroad in the land. It is evidenced by our dislike of experts, by the voice of the demagogue, by our fondness for easy ways. As Professor Perry says, instead of climbing the ladder, we like to sit comfortably at the foot and wait for an elevator. He adds: "A democracy of classes and persons is something to aspire to, but a democracy of values is corruption and nonsense." The best things have to be worked for, and belong only to those who excel. "We must believe that nothing is too good for a democracy. Science, philosophy, art, virtue, and saintliness, must be as reverently regarded, as earnestly sought and cultivated, as formerly. Otherwise, the much-prized opportunity which a democracy affords is an equal opportunity for nothing."

"These several motives which underlie the love of equality are the motives which justify or discredit the ideal of social democracy. In so far as social

democracy means a compassionate regard for all human beings as having feelings, powers, and capacities of the same generic type, in so far as it means the equalizing of opportunity and a mutual respect, it rests upon sound and incontrovertible ethical grounds. But on the other hand, in so far as it exalts failure, inverts standards, and acts as a drag upon the forward movement of life, it is reactionary and abhorrent."

Now if this is what we mean by democracy, do we really mean to practise it and make it prevail? Are we going to live and die for its triumph? The author believes that there are not many Americans who would withdraw the pledge and profession of democracy if they could. We have not lost conviction. We need only the courage to see it through. For "our courage will be tried by the internal readjustments which will be necessary, which are already proving necessary, in so far as social democracy goes forward. It would be fatuous to shut our eyes to the fact that social democracy will have to be paid for. Are we prepared to pay by surrendering personal advantages that we now enjoy? Most of those who read these words would lose materially by a more equal distribution of opportunity, wealth, and power. Now if we enjoy more than the average good fortune, are we willing that

it should be curtailed until such time as those who enjoy only the minimum shall be abreast of us? Are we willing to give up our own dear and familiar satisfactions? Or are we democratic only in so far as we expect to gain by it? If so, we are not ready for the future. This is a time to retrench, not merely in the consumption of luxuries, but in the desire for them. The whole of democracy will be less indulgent to us than the half of it we have so far achieved. Without some previous self-discipline we shall many of us greet the dawn with a wry face. But in so far as we have learned to live more austere, and to find our happiness in those things which are not diminished by being widely shared, we may in the time to come have the heart to be cheerful despite the realization of our ideals."

This most interesting paper closes upon a high note of hope and courage. For the author says: "I count no man a resolute adherent of democracy or of peace, or of any other good thing, who will not, if needs be, fight for that good thing, and with the weapons which will most effectively meet the danger that menaces it. For that reason, I salute as just now the best democrats among us all those fortunate men who are in France or on their way."

Book Reviews

JUDICIAL TENURE IN THE UNITED STATES, With Especial Reference to the Tenure of Federal Judges. By William S. Carpenter, Ph. D., University of Wisconsin. New Haven, Yale University Press, 1918. Pp. 234. \$1.50 net.

This interesting and useful volume presents a critical and historical study of the tenure of judicial office in the United States, with special reference to the federal system of courts, but without neglecting those of the states. Methods of selecting, appointing, and removing judges, with the political reactions which affect their stability in office, receive adequate consideration. But the main theme of the book is the effect upon the judicial tenure of the rise and growth of the doctrine that it is the prerogative and duty of the courts to decide upon the constitutionality of laws when properly challenged. It is shown how the gradual acceptance of this great principle made it apparent that the judges must be really independent, and could not perform their high constitutional duty fearlessly and conscientiously if placed at the mercy of popular or political favor. On the other hand, the attacks upon the judiciary which always follow the rendition of a just but unpopular decision almost invariably take the form of proposals for making the judicial tenure unstable and insecure, by means of popular elections, short terms of office, easy methods of removal, or the

"recall." The battle for the so-called "democratization" of the judicial establishment, but really to make the judges subject to the caprice of the multitude, is unending, and Professor Carpenter has rendered a notable service in his review of its history and its present status.

A very interesting chapter is devoted to the control of Congress over the establishment and jurisdiction of the lower courts of the federal system, including the question whether a federal judge can be legislated out of office by the abolition of the court in which he sits, a question which, so far as the legislative precedent goes, must be considered as answered in the affirmative. The discussion discloses what appears like an hiatus in the Constitution. For whereas the federal judges hold their office "during good behavior," they are impeachable only for "treason, bribery, or other high crimes and misdemeanors," from which it follows either that judicial misbehavior must be considered as a crime or misdemeanor (though there can be no crimes against the United States except those defined by statute) or else that impeachment cannot be the only mode of removing a judge guilty of misbehavior in office. This was at one time very earnestly argued in Congress, and the question took on fresh interest upon the impeachment of a district judge who was so clearly insane that he could not have been held responsible for his acts before any

ordinary tribunal. Such a case could have been met by the provision, found in many of the state constitutions, for the removal of a judge by the executive authority on an address by the legislature. Professor Carpenter's exposition of this subject, in the succeeding chapter of the book before us, is exceedingly interesting and is richer in historical details than any other discussion of it that has come to our attention. Praise must also be given to the author's review of the movements and tendencies in the state governments which have affected the methods of selecting the judges, whether by party nomination and popular election or by executive, legislative, or mixed appointive power, and the length of their terms of office. He concludes that the history of the American state judiciary does not furnish any conclusive argument in favor of either the elective or the appointive method of selection. For at different times and in different states, courts composed of elected judges have shown themselves exceptionally strong and independent, while other courts, whose judges were appointed and held office for life, were neither the one nor the other. "The method of selecting judges," he thinks, "is best determined by local conditions. It is by keeping the courts free from executive or legislative control and removing them from the influence of temporary popular majorities that the independence of the judiciary is maintained."

In this connection it is interesting to note that the Massachusetts Constitutional Convention recently rejected, by

a vote of 125 to 32, a proposed amendment to the constitution making the judges of that state subject to popular election, and likewise disapproved, by a vote of 107 to 69, a proposal that the judges should be appointed for a term of seven years, thus continuing the present system of appointment during good behavior, though it has favored the submission of an amendment empowering the governor, with the advice of the council and after due notice and hearing, to retire any judge because of advanced age or mental or physical disability.

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AN OUTLINE SKETCH OF ENGLISH CONSTITUTIONAL HISTORY. By George Burton Adams, Litt. D. New Haven: Yale University Press, 1918. Pp. 208. \$1.75 net.

This volume presents in clear, readable, and well-balanced form a summary of the long story of constitutional development in England. It is not a primer nor a class-room text, nor is it a compendium of dates and documents. It presupposes a fairly complete knowledge of English history and some acquaintance with the chief landmarks of constitutional progress. But given this foundation, it should be of much value and interest to general readers, particularly those who seek a knowledge of the historic bases for many of the most important features of our own governmental institutions and of our conceptions of liberty, and yet lack time or inclination for the more exhaustive works of Stubbs, Hallam, May, and others. For, as the author

remarks, "it is as justifiable to claim for our present constitution an origin in the English constitution of 1399 as it is to claim it for the British constitution as it now exists. The creation and establishment of our judicial institutions and common law, of the supremacy of law over the government, of our representative system, of the popular control of taxation, of the responsibility of ministers of government to the legislature, and finally of the principle, fundamental to all else, of the sovereignty of the people, were the work of our English ancestors."

It is not very easy for the average American, accustomed to think of a constitution as completely formed at one time and enacted as a whole, or at least as built up by a series of formal amendments, to realize how much of the constitutional development of England was fortuitous and unpremeditated. In this aspect, Dr. Adams' book is highly suggestive. For it is not so much a narrative of events as a philosophic study of tendencies, of underlying causes, and of institutions as the logical outcome of events. Thus, his observation is very just that "the unwritten constitution was as little intended as a Parliament of two houses. It was an accident of the situation and was due to the fact that the work which England was doing in constitution-making was new to human experience. The constitutional future could not be foreseen nor planned in detail, nor the needs of government provided for in advance, because this road had never been traveled before. The constitution was slowly made, not according to any theoretical ideal, but by finding a prac-

tical solution for every problem as it arose. The result in each case was rather a way of doing things than a formal provision, though it might be and often was afterwards put into statute form as a single detail." This helps to explain much of the difference between the English and American meanings of the word "constitutional," and the apparent anomaly of a constitution of government which the legislature may and does change at will, as in the case of the Parliament Act of 1911. For it is easier and of less evident moment to alter a "way of doing things" than a formally adopted written organic law. Even the origin of Parliament—if we are to find it in the summoning of knights and burgesses to the Great Council—was due to a practical problem, and not to the carrying out of any theory of government. For all that was wanted of the representatives of the counties and towns, at first, was reliable information as to the state of local feeling and public opinion about important pending questions. "If the printing press and the telegraph had existed in the last half of the thirteenth century to render possible the easy collection of information from all parts of the country, we may question whether representative institutions would ever have been invented, for their purpose could have been more easily served in another way."

But however unpremeditated, however grounded in a practical and present exigency, England's free institutions have been of incalculable benefit to the advance of freedom in the world at large. To Europe in general, as the author believes, England's most im-

portant contribution has been the invention of government by a responsible ministry. "It has made it easy for many states to establish true republics without the necessity of extreme revolution. The sovereign has found it easier to yield because in form he retains so much. In the march of the world towards democracy, the responsible ministry and the resulting position of the sovereign is probably a contribution of greater practical value than all else England has done, save perhaps the idea of the limited monarchy itself and the impressive lessons and examples that are so numerous throughout her history." To America she gave not only the conception of individual liberty protected by law and the framework of all that is best in our institutions, but even direct authority for the very act by which the colonies became the United States of America. For, as the author points out in a most interesting passage, while Magna Charta was historically only a feudal document, constitutionally it was the basis of free government and of government by the consent of the governed. For it laid down these two fundamental principles, first, "that there exist in the state certain laws so necessarily at the basis of the political organization of the time that the king, or as we should say today the government, must obey them; and second that, if the government refuses to obey these laws, the nation has the right to force it to do so, even to the point of overthrowing the government and putting another in its place." Thus Magna Charta was the first and strongest precedent for the Declaration of Independence. Even for a complete

written constitution, covering the entire frame of government, English history can furnish precedents. For although, as a matter of historical fact, there were written compacts drawn in America which deserve to be called constitutions antedating the "Agreement of the People," presented to the House of Commons in 1649 with a view to its eventual submission to the electorate, yet, as our author declares, the very title of that document implied and was intended to imply exactly what was meant by the preamble to the Constitution of the United States in the assertion: "We the people of the United States do ordain and establish this Constitution." And although the Agreement of the People was never in actual effect, it was otherwise with the "Instrument of Government," drawn up in 1653 by the leaders of the army with the approval of Cromwell, and which is interesting for "the astonishing number of details in which it anticipated later American practice." "This constitution was actually put into operation and formed, nominally at least, the basis of the government of England for something more than three years, the first written constitution in history which actually created a government of delegated powers, defined and limited, for a nation."

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BACK TO THE REPUBLIC. The Golden Mean; the Standard Form of Government. By Harry F. Atwood. Chicago, Laird and Lee, 1918. Pp. 154.

Mr. Atwood warns us that we have been drifting away from the pure type

of representative republican government devised and established by the framers of the American Constitution. In some directions we have been heading toward autocracy; in others, to absolute democracy. But between these two extremes lies the golden mean. Moreover, the republic is the "standard" form of government, in the sense that experience has shown it to be the one which best accomplishes the great ends of government, the firm protection of the citizen in the enjoyment of his rights and the success, prosperity, and welfare of the people as a whole. So long as we adhered to the principles of the forefathers and administered the government as they had established it, the liberties of the individual were secure and the nation grew in greatness and in power. But since about the beginning of the twentieth century there has been a period of retrogression. "Demagogues and propagandists, blinded with ego-mania, have kept up a constant campaign of agitation in the various states for the initiative, referendum, recall, boards, commissions, city managers, socialistic doctrines, and anarchistic heresies, until we may truthfully say that for some years we have been passing through an age such as Alexander Hamilton had in mind when he said, 'There are seasons in every country when noise and impudence pass current for worth, and in populous communities especially the clamor of interested and factious men is often mistaken for patriotism.'" It is time to get back to the republic. And Mr. Atwood thinks that a desirable first

step would be to adopt the short ballot in the states, and place the horde of elected officials under the appointing and removing power of the executive. Nor has he any patience with the inordinate multiplication of boards, commissions, and other administrative agencies, all more or less independent of each other and of the executive authority, which is so largely responsible for the decentralization and disintegration of the state governments. As for some of the other excrescences upon our body politic, he remarks: "Socialism is that phase of democracy which negates property rights. Anarchy is that phase of democracy which negates law. The initiative is that phase of democracy which makes it possible for the infuriated mob, under the leadership of the demagogue, to enact legislation. The referendum is that phase of democracy which assumes that the minority should rescind impulsively at a special election the deliberate action of the majority at a regular election. The judicial recall is that phase of democracy which makes it possible to take a case from the courtroom, where it may be decided in accordance with the law and the evidence, to the street-corners, where the agitators may appeal to passion and prejudice. Government ownership is that phase of democracy which assumes that government should not mind its own business." Granting that our form of government does not always work well, Mr. Atwood points out that it is not the fault of our institutions but of our people. Words may be misspelled, he

observes, but that is not the fault of the alphabet. Good government must find its foundation in good citizenship. And in this connection we heartily commend the author's plea for the teaching of the principles of constitutional government in the schools and colleges. "The graduates of our state universities," he says, "receive sixteen years' education at the expense of the state, and for that they owe the public, which pays the bill, at least the return of intelligent and effective citizenship." The book is not an academic discussion of the theories of government. It is adapted to the comprehension of the wayfaring man, who is precisely the person that ought to read it. And if he did, he could not fail to have his attention arrested by its vigorous and picturesque language, and his mind opened to the reception of some elementary truths which are especially wholesome and necessary at the present time.

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A WORLD COURT IN THE LIGHT OF THE UNITED STATES SUPREME COURT. By Thomas Willing Balch, L. H. D. Philadelphia, Allen, Lane and Scott, 1918. Pp. 165.

In this sumptuously printed volume, the author, already well and favorably known as a writer on historical and international subjects, presents an argument and a plea for a supreme international court of justice, to which the governments of the world may submit all their controversies with the certainty of obtaining decisions founded on the principles of equity and

justice alone, uninfluenced by political considerations. But to this end he advocates, not successive, temporary, and "quickly disappearing" tribunals, raised each for the trial of a single case, as under the provisions of The Hague Conferences, but a small bench of eminent jurists, holding office for life, and always actually or potentially in session. The model is furnished by the Supreme Court of the United States, which, under its grant of original jurisdiction as defined in the Constitution, habitually decides controversies between the quasi-sovereign and independent states of the Union, without appeal, and with scarcely a threat of disobedience or resistance to its mandates. In support of his argument, Dr. Balch has presented a most interesting, complete, and well-documented review of the history of interstate arbitration and litigation from the dispute between the New Netherlands and Connecticut in 1650 to the present time. He points out that the Articles of Confederation made provision for the settlement of disagreements between the states by a board of commissioners or judges under the auspices of Congress. But in each case it was a tribunal created merely *ad hoc*, and the long step in advance which is his ideal for international adjudications (from a board of arbitrators to a permanent and supreme court) was actually taken by and for the states when the Constitution of the United States was adopted.

Since the foundation of the government, our Supreme Court has not only adjudicated twelve cases of boundary

disputes between states, but has also given its final decree in controversies involving "the regulation of water courses which, taking their rise in one state, passed lower down in their course into and through the land of another commonwealth; the regulation of the discharge of sewage by one state so that one of her sister states complained that it was a detriment to the latter's interest; the enjoining of nuisances in neighboring commonwealths; finding out and apportioning in an equitable proportion public or state debts; and other subjects involving the interests of the inhabitants of two states." But special circumstances favored and even necessitated the placing of a supreme umpire over the quarrels of our States. Were a world's court in existence, would the nations submit their controversies to it, foregoing the chances of war? Quite readily they might be disposed to do so, the author thinks, in respect to merely legal questions, such as claims for damages. But upon the emergence of political questions, such as might be supposed to affect the vital interests or the honor of a people, he feels no confidence that even a full realization of the appalling waste and horror of war would restrain the greed or the autocratic urge of a powerful nation, no matter how perfect might be the judicial machinery provided for the peaceful auditing of its claims. His answer to his own question, whether a supreme court of the world could have composed the differences between the nations in the summer of 1914, may be guessed. But such a court, armed with

power to compel the submission of disputes and with the further power to enforce its judgments, might stand in a different place. "It would seem that, in the final analysis, the only way a supreme court of the world could force individual nations to bow before its decisions in all cases, would be the development of an international executive with sufficient power at its command to enforce the decisions of that supreme court of the world, just as behind the Supreme Court of the United States has stood, always excepting in the Dred Scott case, the overwhelming power of the nation as against any one single member state of the North American Union." But the beautiful ideal of a world bound to keep the peace is a long way off. Long effort and wise thought must go to its realization. "The teaching of the past efforts of humanity to minimize or eliminate war from the politics of the world shows that this cannot be accomplished in the international sphere of the family of nations by one master stroke of statecraft, but that that aim can only be attained, if it is attainable, by the slow and gradual process of evolution." How far that process may lead, who can tell? It may be, as the author suggests, that the deathknell of our present civilization has sounded, and that the world must pass through centuries of time, comparable only to the Dark Ages, before the dawn of another civilization able to bring to fruition those dreams of a reign of righteousness, instead of might, which men of all times have cherished. And so the book closes

upon a note of something very like despondency. It was not within his purpose to remark (although it cannot have escaped his notice) that a more direct and more remarkable precedent for a general international court was established eleven years ago by the five Central American republics south of Mexico, which set up a Central American Court of Justice and agreed to submit all their differences and disputes to it. The convention or treaty provided that it should continue in existence for a term of ten years. It is true that it was not renewed, and that this was at the request of one of the participating governments. But in the decade of its existence, this experiment was eminently successful. For the court actually averted two wars, encouraged closer relations between the five signatory powers, even to a project (not yet abandoned) for their permanent incorporation into one federal republic, and created a general desire for peace, arbitration, and fraternity among the people of the several states.

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THE STATE CONSTITUTIONS, and the Federal Constitution and Organic Laws of the Territories and Other Colonial Dependencies of the United States of America. Compiled and Edited by Charles Kettleborough, Ph. D. Indianapolis, R. F. Bowen & Co., 1918. Pp. 1644.

By the use of thin paper, yet sufficiently tough and opaque to be suitable for a work of reference, it has been

possible to bring together in one volume of moderate size, though of many pages, the existing constitutions of the forty-eight states, together with the Constitution of the United States and the acts of Congress which constitute the organic laws of Porto Rico and the Philippines and the other territorial possessions of the United States. In making this compilation, Dr. Kettleborough has performed a very notable and timely service for students of comparative constitutional law, members of state legislatures and of constitutional conventions, and all who may wish to inform themselves accurately as to the provisions of any or all of the state constitutions on a given topic. How serviceable the book is, and how much it was needed, can scarcely be appreciated unless one adverts to the fact that all previous compilations of this sort are antiquated and now mostly out of print, and, in so far as their contents may be of historical interest, they are accessible only in the large libraries. Anyone who has tried to make for himself a collection of the state constitutions separately and in pamphlet form (as the writer of this notice did) will have found to his surprise that some of them are entirely out of print and unavailable in any form, that others have been published as a matter of private enterprise and are for sale at prices varying from twenty-five cents to a dollar, and that still others are not printed at all except in the ponderous volumes of the Revised Statutes or Compiled Laws. It is an astonishing fact, and not a very creditable one, that there are parts of

our country where a citizen cannot inform himself of the provisions of the constitution of his own state except in a lawyer's office or the state library. In the volume before us, all the constitutions are printed at full length in their form as amended to date, and the work is enriched with valuable

editorial notes as to the date and manner of adoption of the existing constitution in each state, and as to the origin and adoption of the various amendments included. The author is to be congratulated on his successful achievement of a laborious but very useful task.



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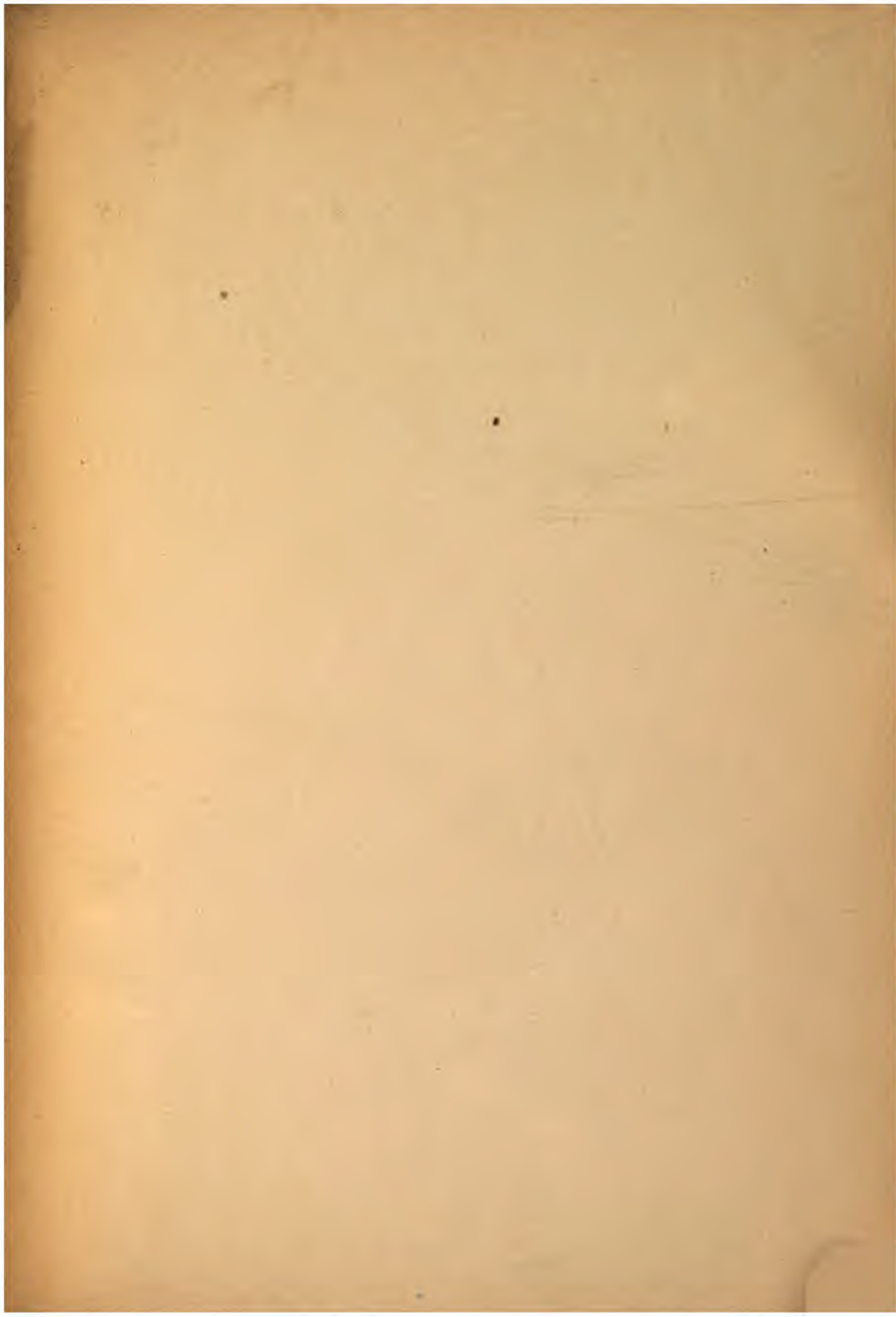
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